Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

MICHAEL CZICHRAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THE THOMPSON V. KEOHANE HABEAS STANDARD OF REVIEW, WITH ITS PRESUMED CORRECTNESS IN STATE COURT FACTUAL DETERMINATIONS, WAS ERRONEOUSLY EXTENDED BY THE COURT OF APPEALS IN REVERSING THE TRIAL COURT'S FINDING THAT PETITIONER'S INTERROGATION WAS CUSTODIAL, A FINDING WHICH SPECIFICALLY REJECTED THE TESTIMONY OF AGENTS WHO SAID IT WAS NOT?

WHERE THE DISTRICT COURT FOUND THAT THE FBI AGENTS LIED ABOUT THEIR INITIAL PURPOSE IN VISITING PETITIONER, LIED ABOUT THE PLANNED LENGTH OF THE INTERVIEW, CUT OFF HIS TELEPHONE CALLS OUT AND ACCESS TO THOSE WHO ARE TRYING TO CONTACT HIM, THREATENED HIS BUSINESS INTERESTS AND WOULD NOT LEAVE HIS HOME UNTIL SECURING A STATEMENT SEVEN HOURS LATER, IS THE CIRCUIT'S SUBSTITUTED FINDING OF CUSTODIAL STATUS CONTRARY TO BECKWITH V. UNITED STATES?

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LIST OF PARTIES

Michael Czichray

United States of America

OPINION BELOW

The Eighth Circuit's panel decision is found at United States v. Czichray, 378 F.3d 822 (8th Cir. 2004), filed August 11, 2004. The District Court's two decisions are unpublished and appended.

STATEMENT OF JURISDICTION

The Eighth Circuit's split panel decision is dated August 11, 2004. Mr. Czichray's Petition for Rehearing and Rehearing En Banc was denied (with Judges Morris Sheppard Arnold, Murphy, Bye, Melloy and Smith voting to grant the petition) on October 5, 2004. This Petition is filed within ninety days. 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment provides, in part, that no person "shall be compelled in a criminal case to be a witness against himself."

STATEMENT OF THE CASE

The government has prosecuted Michael Czichray piecemeal, in two separate indictments. By first charging him with low-guideline crimes (a bank fraud where the loan was current) (File 01-307), followed by a second indictment (alleging higher guideline losses) (File 02-295), the government was allowed multiple motion hearings before two Magistrate Judges concerning the admissibility of Mr. Czichray's statement. The district court, the Honorable John R. Tunheim, twice suppressed.

It was the 16th of February, 2001, 4:30 A.M., the morning cold. A telephone call by the FBI; Michael Czichray answered. The FBI said it had the wrong number, the first lie. (12.13.2001Tr. at 29-30.)[1]

Go to 6:30 AM. FBI Agent Sean Boylan knocked on Czichray's front door of his home in Columbia Heights, a suburb just north of Minneapolis. The FBI encountered silence, begging the question of who would answer such a knock at that hour. (11.26.2002 Tr. at 48.)[2]

Then a second call. This is Sean Boylan, "Mr. Czichray, you need to answer. You need to come to the door." (JRT Order I at 2)[3]; (11.26.2002 Tr. at 49-50.)

To the front door came Czichray wearing underwear, a t-shirt, no socks. (12.13.2001 Tr. at 31.) Here they were, Boylan and fellow Agent Timothy Bisswurm. Credentials out, cards pointed, the first phone call a precursor to their second act of deceit. "I explained to him," recalled Boylan, "that we'd like to take a few minutes of his time. . ." (11.14.2001 Tr. at 16.)[4] (emphasis added); (11.27.2002 Tr. at 61.)[5]

Agent Boylan knew Czichray had "other business of

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[1] "12.13.2001 Tr." refers to the Transcript of the Motions Hearing before Chief Magistrate Judge Noel held on December 13, 2001.

[2] "11.26.2002 Tr." refers to the Transcript of the Suppression Hearing before Magistrate Judge Erickson held on November 26, 2002.

[3] "JRT Order I" refers to the Order dated by the Honorable John R. Tunheim on January 7, 2002.

[4] "11.14.2001 Tr." refers to the Transcript of the Motions Hearing before Chief Magistrate Judge Noel held on November 14, 2001.

[5] "11.27.2002 Tr." refers to the Transcript of the Suppression Hearing before Magistrate Judge Erickson held on November 27, 2002.

the day," business that "he's going to have to take care of." (11.14.2001 Tr. at 16.) For his part, Czichray thought they wanted to make an appointment for a later interview. (12.13.2001 Tr. at 59.)

Agents Boylan and Bisswurm, not waiting for an invitation, saw an open living room and there they would remain. (12.13.2001 Tr. at 32.) Czichray was asked to sit in a chair he never used, to hear a monologue about warrants (though none existed for a search of his home), a fraudulent billing scheme, and "the power of the FBI." (12.13.2001 Tr. at 36.)

The opening allegations would last until after 9:00 A.M., at which time Czichray said to Boylan, "I am already late for work. I have to be at work." Boylan responded that they, the agents, "weren't finished." (12.13.2001 Tr. at 37.) That Czichray would "not probably be taking care of whatever responsibilities he had for the day." (11.14.2001 Tr. at 24.) Boylan suggested Czichray lie himself, and call his office feigning illness, that he omit mention of the FBI. Czichray followed orders, the only call he would make. (11.27.2002 Tr. at 80-81.); (12.13.2001 Tr. at 37, 63.)

For the hours that followed, Czichray was held incommunicado. His employee Carrie Braun tried to reach him at 7:30 AM, to discuss the day's appointments. She left a message. (12.13.2001 Tr. at 66.) He would always call back, but not now. (12.13.2001 Tr. at 67.) Braun called again, at 8:30 AM, at 11:00 AM and so on. "I think I tried a total of like eight or nine times," she said. (12.13.2001 Tr. at 67.) When her calls came into Czichray's home, Agent Boylan directed, "Don't answer that." (12.13.2001 Tr. at 38-39.)

There were additional restrictions. Mr. Czichray was given no food, nor drink. (12.13.2001 Tr. at 41.) When he left his chair to put on a pair of pants, Boylan followed.

(12.13.2001 Tr. at 41.) When he wanted to defecate, Boylan remained at the open doorway, asking if Czichray had a phone where the toilet was. (12.13.2001 Tr. at 40). The district court found that the Agents' "behavior canceled out their verbal assurances that Czichray could refuse to cooperate." (JRT Order I at 7.) The same finding appears in the second Order. (JRT Order II at 37.)[6]

Boylan also emphasized to Czichray, a chiropractor, that if he didn't cooperate, his MRI clinic would be shut down, "[W]e're the FBI, and you don't think if we tell . . . the insurance company not to pay, they're not going to pay you. We'll put you out of business." (12.13.2001 Tr. at 43.) At the first motions hearings, the Agents denied the obvious meaning of such statements. (11.26.2002 Tr. at 60.) At the second round of hearings (on the first indictment), the FBI denied making this threat: "I know your parents live next door. I know your father is 75 years old. If you do not cooperate, we do not continue, we're going to light up his world; we're going to light up your world." (12.13.2001 Tr. at 41.)

In his testimony, Agent Boylan did not mention using the phrase, "light up your world". (11.27.2002 Tr. at 161.) When Magistrate Judge Franklin L. Noel asked Agent Bisswurm at a second hearing what the phrase "light up" Mr. Czichray's life or that of his father's meant, he responded that the phrase was indeed said (disagreeing with Boylan) but interpreted it to mean "we would need to go and interview those persons to get information relative to our investigation." (12.13.2001 Tr. at 73.)

Czichray differed: "I don't have very much experience with law enforcement, but if somebody from the

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[6] "JRT Order II" refers to the Order dated by the Honorable John R. Tunheim on August 22, 2003.

FBI comes and tells you that they're going to light up your world, it's a scary thing. They can do anything." (12.13.2001 Tr. at 61-62.)

On this point, the district court found "Czichray to be more credible than the agents." (JRT Order II at 18, n. 3.)

At the seven-hour mark, Czichray signed Boylan's handwritten statement.

Czichray's motion to suppress was granted, on these grounds:

> ... The Court finds that Boylan and Bisswurm's heavy-handed domination of Czichray's movements and their preventing from communicating with others undermined Czichray's consent to enter his home, and negated any promises – no matter how numerous – that the interview would be purely voluntary. . . [U]nder the totality of the circumstances, a reasonable person in Czichray's position would not have believed that he was free to terminate the interview and ask the agents to leave. . . Because he was in custody without having been appraised of his Miranda rights, no waiver of those rights – such as that ostensibly found in the written statement – is valid because it was not knowing and intelligent. See Miranda, 384 U.S. at 44; (additional citation omitted) . . . Therefore, the illegally-obtained written statement must be suppressed.

(JRT Order II at 38.)

The United States appealed. 28 U.S.C. §3731.
By a divided panel, the Eighth Circuit reversed.

Judges Coloton and Wollman found that since the agents "informed Czichray at least eight times that his participation in the interview was voluntary, and that he was free to ask the agents to leave his home," this was "powerful evidence that a reasonable person would have understood that he was free to terminate the interview." Id. at 826. The panel added that the "weighty inference that Czichray was not in custody after receiving such advice is strengthened further by the context in which the interview occurred – the living room of Czichray's home." Ibid. Leaving no doubt that its decision was site-based, the panel opined that, in Beckwith v. United States, 425 U.S. 341, 346 & n. 7 (1976), this Court's "only decision involving whether Miranda applied to questioning of a suspect in a private home absent formal arrest," the "prophylactic rule of Miranda was not applicable." Id. at 827. Referencing Yarborough v. Alvarado, 124 S.Ct. 2140, 2144-46, 2149-50 (2004), where the police initiated a two-hour interview at the station house, where the conversation was "pretty friendly," and where the state district court was "reasonable" in concluding the interview was noncustodial, the panel, by fiat and without lower court agreement, assumed "Czichray's decision not to terminate the interview and to allow the interview to proceed to its closing suggests an exercise of free will, rather than restraint to a degree associated with formal arrest." Id. at 829.

Judge Morris Sheppard Arnold dissented:

> . . . Only two considerations (whether Dr. Czichray was informed that he was free to end the interview and whether he was arrested at the end of the interview) tend to support a finding that he was not in custody. But actions sometimes peak louder than words. I believe that the agents' restrictions on Dr.

> Czichray's movements and on his access to his telephones significantly undermined any statements that they made to him about his freedom to ask them to leave or to end the interview. A reasonable person in Dr. Czichray's position would not believe that he was free to end the interview or to ask the agents to leave. Thus only one fact (the absence of an arrest at the interview's conclusion) weighs substantially in favor of the government's position, and in any event as an original proposition it hard to see why this fact has much if any relevance to the question of whether Dr. Czichray was in custody...
>
> Because the written statement in the instant case was made during an "incommunicado interrogation . . . in a police-dominated atmosphere . . . without full warnings of constitutional rights," Miranda, 384 U.S. at 445, I would affirm the district court's order granting the motion to suppress.

Id. at 833-34.

Mr. Czichray's Petition for Rehearing and Rehearing En Banc was denied, on October 5, with Judges Morris Sheppard Arnold, Murphy, Bye, Melloy and Smith voting to grant it.

Mr. Czichray timely files this petition.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. Thompson and the standard of review.

The district court found the FBI testimony was not worthy of credit. The Eighth Circuit then accepted as true the disbelieved. The gateway issue concerns the scope of review of Thompson v. Keohane, 516 U.S. 99 (1995) to a direct appeal.

The Eighth Circuit's standard has changed since Thompson came down. Currently it is this: "We uphold findings of historical fact unless clearly erroneous, but we apply the controlling legal standard to the historical facts utilizing independent review." United States v. Axsom, 289 F.3d 496, 500 (8th Cir. 2002) (noting, however, that in direct appeals the clearly erroneous standard has also been used); United States v. LeBrun, 363 F.3d 715, 719 (8th Cir. 2004) (en banc) (same). These cases govern ours. Czichray, 378 F.3d at 825. Axsom and LeBrun relied upon Thompson, which concerned a Sec. 2254 review of a suppression ruling, where findings of the state bench "shall be presumed correct." 28 U.S.C. §2254 (e)(1).

Here the matter was heard first hand. Out of imperative, the federal district court "alone acts as the ultimate decision-maker" and is allowed "broad discretion to accept, reject or modify the magistrate's proposed findings," United States v. Raddatz, 447 U.S. 667, 680 (1980). "[A]s a matter of sound administration of justice, the judicial actor is better positioned than another to decide the issue in question," Miller v. Fenton, 474 U.S. 104, 114 (1985), and is granted flexibility to resolve the "multifarious, fleeting, special, narrow facts that utterly resist generalization." Koon v. United States, 518 U.S. 81, 99 (1996) (quoting Pierce v.

Underwood, 487 U.S. 552, 559-560 (1985)).

The problem with the habeas standard of review used here is the blending separate ideas. "[T]he proper characterization of a question as one of fact or law is sometimes slippery." Thompson, 516 U.S. at 110-111. Slippery or not, it remains the trial court's right to reject unbelievable testimony. Thompson, 516 U.S. at 119 (J. Thomas, joined by C.J. Rehnquist, dissenting) ("I have no doubt that the state trier of fact is best situated to put himself in the suspect's shoes, and consequently is in a better position to determine what it would have been like for a reasonable man to be in the suspect's shoes."); Bose Corp. v. Consumers Union of United States, 466 U.S. 485, 519 (1984) (J. Rehnquist, joined by J. O'Connor, dissenting) (writing he was "at a loss to see how appellate courts can even begin to make (credibility) determinations" even if the review is de novo).

There has been, always, a dialectic between what is said and what is actually meant. The FBI's testimony was never an end point, instead "one among many factors that bear upon the assessment whether that individual was in custody, but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave." Stansbury v. California, 511 U.S. 318, 325 (1994).

Under the habeas standard, historical facts are those that depend upon the "credibility of their narrators." Thompson, 516 U.S. at 110 (quoting Townsend v. Sain, 372 U.S. 293, 309 n. 9 (1963) (quoting Brown v. Allen, 344 U.S. 443, 506 (1953)(opinion of Frankfurter, J.)). Contrary to Thompson, the Circuit erroneously adopted the FBI's version – that of course Czichray wasn't threatened, and of course his movement and freedom were not restricted. This after the

agents were found to be not honest, in five ways.

1. The district court held the Agents' promise that Mr. Czichray could leave at any moment did not ring true. (JRT Order I at 7.)

2. The court ruled "it incredible that Boylan escorted Czichray to the bathroom to search for weapons or out of a concern for safety. Rather, Boylan's own testimony reveals that his true concern was looking for a telephone to make sure that Czichray did not place any outside calls." (JRT Order II at 27.) The Court emphasized that "nothing in the Agents' descriptions of the interview – except their post-hoc rationalizations – supports their argument that they acted out of concern for safety." (JRT Order II at 28.; see also JRT Order II at 31-32, n. 11).

3. The court added that "[i]f Czichray's cooperation was truly voluntary, there was no need to control his access to the telephone. If Czichray's cooperation was not coerced, he should have been free at any time to phone a friend or family member and tell them that he was being questioned by the FBI. The agents' zealous efforts to keep Czichray away from telephones demonstrate that he had no such freedom. The restrictions imposed by Boylan and Bisswurm are inconsistent with voluntary cooperation." (JRT Order II at 31.)

4. Even though the agents denied suggesting "that if he did not cooperate, the FBI would pressure insurance companies to withhold payments from his business," the district court determined "Czichray's testimony on this point credible." (JRT Order II at 35.)

5. No matter what they said, or thought they said, or meant to infer, the district court was correct: "Boylan and Bisswurm severely restricted Czichray's freedom within his own home, controlling his movements and preventing him from communicating with anyone outside the house" (JRT

Order II at 36).

What needs to be distinguished by this Court is whether the scope of Thompson, which includes a presumption of correctness, is mandatory to direct appeals especially where the district court is familiar with the key witnesses and casts aside the credibility of law enforcement. The right to reject patently false testimony, accorded great discretion, wasn't given any here.

The trial court's essential finding – that the Agents statements to Czichray dissociated speech from content – if not presumed correct as it would be on a state court review, at the very least must be evaluated for clear error. The Eighth Circuit did neither.

II. Beckwith and custody at home.

Even if somehow factual findings can be substituted on appeal, Czichray's statement was still rightly suppressed. The law is with us.

Whether at a home or station, most law enforcement agencies use two police officers to dominate the interview. See Miranda v. Arizona, 384 U.S. 436, 452 (1966) (noting law enforcement's proclivity for tandem interviewers, the "friendly and unfriendly," the "mutt and Jeff"). Agents Boylan and Bisswurm were matched together for a reason, their exchange with Czichray not meant to be an equal tête-à-tête.

The Miranda warnings serve as a prophylactic to balance out such an unfair advantage. United States v. Patane, 124 S.Ct. 2620, 2627 (2004). That check, a leveling, is required in cases of "incommunicado interrogations of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." Miranda, 384 U.S. at 445.

Miranda defined custody in disjunctive form: warnings must be given "after a person has been taken into custody or other wise deprived of his freedom of action in any significant way." Id. at 444. Over time, the phrase "any significant way," has become less important, faded. Nowadays the test is whether a defendant is deprived of his freedom to a "degree associated with formal arrest," California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam), taking into account the "objective circumstances." Stansbury, 511 U.S. at 323. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." Berkemer v. McCarty, 468 U.S. 420, 442 (1984); see also Alvarado, 124 S.Ct. at 2148.

Context matters. Given his location, Czichray's reasonable expectation of privacy was heightened. See California v. Ciraolo, 476 U.S. 207, 212-13 (1986) (noting the law's significant need to protect "the personal privacy in an area intimately linked to the home."); Payton v. New York, 445 U.S. 573, 576 (1980) (emphasizing the more stringent requirements to be met before police conduct an "invasion of the privacy of the home."); Kirk v. Louisiana, 536 U.S. 635, 638 (2002) (same).

The question of whether Czichray was in de facto custody at his home has been taken up twice before. Orozco v. Texas, 394 U.S. 324 (1968) featured a defendant and the victim who "quarreled" outside a Dallas café near the midnight hour. After the victim was shot, Orozco left the scene and returned "to his boardinghouse to sleep." Id. at 325. At 4:00 AM, four officers entered his room, one of whom announced he was not free to go during the interview, and then Orozco was asked if he owned a certain kind pistol and where it might be. Ibid.

His inculpatory statement, obtained sans Miranda warnings, was suppressed. The State of Texas argued "that

since petitioner was interrogated on his own bed, in familiar surroundings," Miranda need not apply. Id. at 326 (emphasis added). In this Court's view, Orozco was under arrest within his own home before the questions began. Id. at 327. Orozco is near akin to the fact pattern, though not the ultimate holding, of Oregon v. Elstad, 470 U.S. 298, 314 (1984), where the state "conceded the issue of custody" when the defendant was interrogated in his living room by officers accusing him of a robbery.

After Orozco came Beckwith v. United States , 425 U.S. 341 (1976). There the "important" issue was whether IRS agents who made a surprise visit to the defendant at his home should have given Miranda warnings before securing a statement. In Beckwith, unlike here, the Agents did not invent a ruse but rather were invited inside after the doorbell was rung. The defendant was allowed to finish dressing by himself without voyeurism, and the agents at least gave a warning that "anything which you say and any information which you submit may be used against you in any criminal proceeding which may be undertaken." Id. at 343. Afterwards, he noted "that the agents did not 'press' him on any question he could not or chose not to answer" The interview lasted just two hours. Ibid.

This Court found the interrogation admissible on the specific facts, but opened a door to future claims like ours: "We recognize, of course, that noncustodial interrogation might possibly in some situations, by virtue of some special circumstances be characterized as one where 'the behavior of . . . law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined . . .'" Id. at 347-48 (quoting Rogers v. Richmond, 365 U.S. 534, 544 (1961)).

The Eighth Circuit did not mention this language, misconstruing Beckwith only to hold that "Miranda was not

applicable" to home interrogations. Czichray, 378 F.3d at 827. Nor did the Circuit consider this Court's recent bold caution that the "Miranda rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebutable for purposes of the prosecution's case in chief." Patane, 124 S. Ct. at 2627.

There hasn't been a case since Beckwith and its recognition that in certain circumstances the police may go too far, become too overbearing once inside a private home. If Isaiah Berlin is right – that the essence of freedom is having a choice, The Proper Study of Mankind: An Anthology of Essays, Farrar, Straus and Giroux (1998) at 10 – there came a point in time, as the hours went by and the Agents wouldn't leave, when Mr. Czichray had none.

It's ironic our claim – that time and place restrictions here yielded to a custodial status – once resonated in the Eighth Circuit. A three-hour at home interview, of a defendant police officer no less, crossed the custodial threshold a generation ago in United States v. Longbehn, 850 F.2d 450 (8th Cir. 1988). Three law enforcement agents were in the defendant's house pursuant to a court sanctioned search. "At least one of the agents chaperoned Longbehn for the duration of the entire search." Id. Though he was released after giving his statement, the Circuit concluded "Longbehn's detention was police-dominated, inherently coercive and tantamount to a formal arrest." The end holding was identical to the Judge Tunheim's here: "Thus Longbehn should have been given Miranda warnings before he was questioned by law enforcement personnel." Id. at 453 (citation omitted).

United States v. Griffin, 922 F.2d 1343 (8th Cir. 1990) recognized what was objectively obvious to Czichray, and to the district court who found his perceptions reasonable. "It is not difficult to envision that a suspect's sense of captivity can

actually be intensified by the intrusive and intimidating environment created when agents of the law take control of a person's private residence. After all, a person can not reasonably expect to be free anywhere if not within the refuge of his home." Id. at 1355 at n. 15.

* * *

In sum, the Eighth Circuit has misread and misapplied the standard of review set out in Thompson, particularly as it relates to credibility determinations on direct appeals. The opinion is also in conflict Orozco, Beckwith, and its own cases, Longbehn and Griffin. For these reasons, the Circuit "has so far departed from the accepted and usual course of judicial proceedings," so as to invite further review. Rule 10(a), Rules of the Supreme Court of the United States. As well, the Circuit has decided an important question of federal law – whether custody may occur during an in-home investigation that lasts seven hours – that should be "settled by this Court." Rule 10 (c).

A central purpose of Miranda is "to give concrete constitutional guidelines for law enforcement agents to follow." Dickerson. v. United States, 530 U.S. 428, 439 (2000) (quoting Miranda, 384 U.S. at 441-442). This Court takes a jaundiced view of law enforcement strategies "dedicated to draining the substance out of Miranda." Missouri v. Seibert, 124 S.Ct. 2601, 2608 (2004). The once favored technique of securing an un-warned confession, then reading Miranda card to the defendant and getting him to say the same statement, is no longer. Id. at 2612-13, 2618.

The commonly used FBI method – of staying in a suspect's house uninvited for hours on end and then later testifying that such a visit was pleasant, happy and voluntary, and noncustodial – should not be allowed to continue, either.

After all, it is not for Czichray alone to say, as Eliot has, "Should I, after tea and cakes and ices/ Have the strength to force the moment to its crisis?"[7]

CONCLUSION

Mr. Czichray requests that his Petition be granted.

Dated: January 3, 2005

Respectfully submitted,

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[7] The Love Song of J. Alfred Prufrock (1917)

APPENDIX

Order Rejecting Report and Recommendation of Magistrate Judge (1/07/02) A1-A11

Memorandum Opinion and Order (8/22/03) A12-A60

Opinion of the 8th Circuit Court of Appeals in United States v. Czichray, (8/11/04) A61-A78

Order Denying Petition for Rehearing and for Rehearing En Banc (10/5/04) A79

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICHAEL S. CZICHRAY,

Defendant.

Criminal No. 01-307 (JRT/FLN)

ORDER REJECTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE

John R. Marti, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415, for plaintiff.

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Defendant Michael Czichray ("Czichray") is charged with six counts of bank fraud in violation of 18 U.S.C. §§ 1001(a)(3), 1014, 1344, and 2. This matter is before the Court on Czichray's objections to the Report and Recommendation of United States Magistrate Judge Franklin L. Noel dated December 19, 2001.

The Court has conducted a *de novo* review of Czichray's objections pursuant to 28 U.S.C. § 636

(b)(1)(C) and D. Minn. LR 72.1(c)(2). For the reasons set forth below, the Court rejects the Report and Recommendation of the Magistrate Judge and grants defendant's motion to suppress statements.

BACKGROUND

Defendant Michael Czichray became a suspect in a long-running FBI investigation of health care billing fraud schemes in Minnesota. As part of this investigation, FBI Special Agents Michael Bisswurm and Sean Boylan ("the agents") interviewed Czichray at his home on February 16, 2001.

Czichray moved to suppress statements he made to the FBI, and the Magistrate Judge heard testimony at two hearings from the agents and from Czichray, which conflicted in material respects. The following findings of fact reflect the Magistrate Judge's credibility determinations and this Court's independent review of the record.

At approximately 4:30 a.m. on February 16, 2001, Agent Bisswurm called Czichray's home to determine whether Czichray was in the house. Agent Bisswurm did not identify himself, but rather said that he had the wrong number. At approximately 6:30 that morning; the agents arrived at Czichray's house, and either rang the doorbell or knocked on the door. There was no response, but the agents could see through a large bay window that the television and lights were on in the living room. The agents went back to their vehicle, and called Czichray's house from a cell phone. When Czichray answered the phone, Agent Boylan identified himself and told Czichray that he needed to come to his front door. Czichray, still in his underwear, opened the front door, where the agents were standing with their identification. Agent Boylan identifed himself and Agent Bisswurm as FBI agents, and said that they would "like to take a few minutes of [Czichray's] time, like to give him some

information, and he doesn't have to, if he doesn't want to, talk to [the agents], but we'd like to give him this information." November 14, 2001 Transcript at 16. The agents added that "when we're done, we're going to have to go on our way, and [Czichray has] other business of the day, that we're unaware of, that he's going to have to take care of." *Id.* Czichray let the agents in the house. .

The agents directed Czichray to sit down in the living room. Agent Boylan again told Czichray that the interview was voluntary, and that when the interview was over, the agents would leave, and Czichray could go on with his day. Agent Boylan then launched into what the Magistrate Judge described as a "two hour monologue" about the ongoing health care fraud investigation, how it implicated Czichray, and the investigative power of the FBI. The agents did not consider Czichray to be in custody, so they did not advise him of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966).

Although the agents informed Czichray that the interview was voluntary, they also made threats about what would happen if he chose not to cooperate. The agents told Czichray that they knew his 75-year-old father lived next door, and that if Czichray did not cooperate, the agents would interview his father and others. Specifically, the agents threatened that the interviews would "light up his world," which apparently means that the interviews would enlighten Czichray's father and others to Czichray's allegedly fraudulent activities. The agents also threatened that if Czichray did not cooperate, they could use the power of the FBI to prevent insurance companies from making payments to his business. Czichray testified that he understood "cooperate" to mean that he "had to listen to what [the agents were] saying to [him]. Couldn't tell [the agents] to leave. [He] had to do what they said and agree to what they were telling [him]." December 13, 2001 Transcript at 44.

At approximately 9:30 a.m., Czichray, still in his underwear, told the agents that he was late for work. The Magistrate Judge determined that the agents directed Czichray to. call in sick so that the interview could continue. Czichray called in sick, and at the agents' direction, did not inform his office that he was being questioned by the FBI. As the interview continued, Czichray's home phone and cell phone rang many times, but Czichray did not answer the phone. The Magistrate Judge concluded that Czichray was complying with the agents' instructions not to answer the phone. At some point during the nearly seven-hour interview, Czichray asked to use the restroom. One of the agents responded by asking if there was a phone in the restroom. An agent then accompanied Czichray to the restroom and checked it before allowing him to use the restroom. A similar procedure was followed when Czichray asked to put on some pants. At the conclusion of the interview, the agents left Czichray's residence. The agents never handcuffed Czichray, placed him under arrest, or displayed any weapons.

While being interviewed, Czichray made several incriminating statements that related to the health care fraud investigation. The agents drafted a handwritten statement , summarizing this information ("the written statement"), which Czichray initialed on each page and signed. The government has stipulated that, pursuant to the Magistrate Judge's Order of December 19, 2001, it does not intend to offer the written statement into evidence. The agents later prepared a report of the interview, known as a "302." This report contained additional oral statements made by Czichray about his business, its employees, investors, and financing. The government now seeks to introduce these portions of the 302 report, which it claims do not relate to the material excluded by the Magistrate Judge's Order.

The questions before the Court, therefore, are: (1)

whether Czichray was in custody during the interview at his home on February 16, 2001, and therefore should have received the *Miranda* warnings; and (2) whether Czichray's statements, as reported in the 302, were made voluntarily.

ANALYSIS

I. Custody

Czichray objects to the Magistrate Judge's finding that, under the totality of the circumstances, he was not subjected to custodial interrogation.[1] Czichray argues that because he was in custody during the interview on February 16, 2001', his statements must be suppressed because he was not informed of his rights under *Miranda.*

A suspect is "in custody" for purposes of *Miranda* upon arrest, or when the suspect is "deprived of his freedom of action in any significant way." *Miranda,* 384 U.S. at 444; *United States v. Johnson,* 64 F.3d 1120, 1125 (8th Cir. 1995). To make this determination, a court must consider whether a reasonable person in the suspect's position would have understood the situation to be one of custody. *Berkemer v. McCarty,* 468 U.S. 420, 442 (1984); *Johnson,* 64 F.3d at 1125. A court must make this objective determination by looking at the totality of the circumstances. *United States v. Griffin,* 922 F.2d 1343, 1347 (8th Cir. 1990).

The Eighth Circuit has identified six relevant factors for courts to consider when determining whether, under the totality of circumstances, a suspect is in custody. *See id.* at 1349. They are:

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[1]Czichray has also objected to the Magistrate Judge's finding that the written statement was voluntary. Because the written statement will not be offered into evidence, this objection is moot and the Court will not address it. The Court must still determine, however, whether the oral statements recorded in the 302 were voluntary.

(1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest;

(2) whether the suspect possessed unrestrained freedom of movement during questioning;

(3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions;

(4) whether strong arm tactics or deceptive stratagems were employed during questioning;

(5) whether the atmosphere of the questioning was police dominated; [and],

(6) whether the suspect was placed under arrest at the termination of the questioning.

Id. Analysis of these factors leads the Court to conclude that Czichray was in custody during the interview at his home on February 16, 2001.

A. Advice Given by the Agents

The Magistrate Judge determined that the agents repeatedly told Czichray that he was free to refuse the interview, and that he could tell them to leave at any time. As the Magistrate Judge also noted, however, the agents' "conduct inside [Czichray's] house suggests. [he] may not have been free to leave or to request the agents to do so." Rep. & Rec. at 7. Although the agents may have told Czichray he could refuse to cooperate, they

followed up such advice with the warning that if he did not cooperate, he would suffer harm. In particular, the agents threatened to involve Czichray's father in the investigation, and threatened to interfere with legitimate insurance payments to Czichray's business. If these verbal threats alone did not negate the agents' assurances that the interview was voluntary, their heavy-handed behavior must have delivered the message that cooperation was expected. As the Magistrate Judge determined, the agents directed Czichray to call in sick, and told him not to alert his office that he was being questioned by the FBI. The agents also controlled Czichray's movements in his own house, monitoring his efforts to use the restroom and to put on pants. Although, as the Magistrate Judge notes, Czichray never asked the agents to leave, the Court determines that the agents' behavior canceled out their verbal assurances that Czichray could refuse to cooperate.

B. Freedom of Movement

During the nearly seven-hour interview, Czichray was instructed to call in sick and to conceal the true reason for his absence from his co-workers. He was also prevented from using the restroom or from putting on pants without an agent accompanying him. Finally, he was directed not to answer or use the telephone. It is clear from these circumstances that Czichray's freedom of movement was significantly restrained during the interview.

C. Who Initiated Contact

The agents first contacted Czichray at 4:30 a.m., when Agent Bisswurm called to see if Czichray was home. The agents rang his doorbell or knocked at 6:30 a.m. When Czichray did not answer, the agents called and instructed Czichray to answer the door. As the Magistrate Judge noted, this was "clearly an agent-initiated contact."

D. Tactics Used by the Agents

The Magistrate Judge determined that the agents did not use "strong arm tactics or deceptive stratagems." The Court concedes that it is a close question whether or not threats to "light up" the life of Czichray's father and interfere with his business constitute strong arm tactics. Although the agents did not threaten Czichray with force, strong-arm tactics need not be limited to threats of force. *See, e.g.; Griffin, 922* F.2d at 1351. Clearly, the agents threatened and pressured Czichray to cooperate. This pressure, combined with the strange and unorthodox way that Czichray was treated during the interview, leads the Court to conclude that the agents did use strong arm tactics.

E. Domination of the Interview

"An interrogation which occurs in an atmosphere dominated by the police ... is more likely to be viewed as custodial than one which is not." *Id.* at 1351-52. Although the interview was conducted in Czichray's home, nearly every other aspect of the situation was controlled by the FBI agents. The interview lasted for seven hours, during a significant portion of which Czichray was still in his underwear. The agents dictated everything, from where Czichray could sit to the manner in which he used the restroom. It is worth noting that the *"Miranda* court was deeply concerned with the effect of an incommunicado, police dominated atmosphere on a criminal suspect's will to resist self-incrimination during interrogation." *Id.* at 1352. The record in this case demonstrates that the interview of Czichray on February 16, 2001, was precisely such a situation.

F. Arrest

Czichray was not placed under arrest after the interview. After obtaining Czichray's signature on the

written statement; the agents left his house.

G. Totality of the Circumstances

The Magistrate Judge thoroughly analyzed the six *Griffin* factors. He concluded that although the evidence showed an "arrogant and obnoxious" display of power by the FBI agents, the totality of the circumstances indicated that their behavior was "not sufficiently overbearing to persuade the Court that [Czichray] was in custody or that his will to resist was overborne."

This determination rested principally on the Magistrate Judge's conclusion that Czichray read and signed the written statement. Czichray claims that he never read the document. The Magistrate Judge did not believe his claim, and found that Czichray did, in fact, read the statement. The Court believes, however, that even if this is true, the statement should not negate the improper treatment that Czichray received at the hands of Agents Bisswurm and Boylan.

The Magistrate Judge determined that nearly every action Czichray took during the interview was directed and controlled by the FBI agents: calling in sick, letting the phone go unanswered, lying to his co-workers, and not being able to wander freely in his own home, even to use the restroom or to put on pants. In each of these instances, the Magistrate Judge accepted Czichray's account over that of the agents. The only instance in which the Magistrate Judge expressly disbelieved Czichray was his claim that he did not **read** the statement. Just because Czichray may have read the statement, however, does not mean that he signed the statement freely. Indeed, the Magistrate Judge concluded that, in the above-mentioned incidents, Czichray was coerced to take several actions he likely did not want to take. Therefore, the Court need not speculate to determine that Czichray was also forced to falsely attest that he was not coerced or threatened.

Although the written statement is not directly at issue here, Czichray's attestation that he was not coerced goes directly to the question of whether he was in custody. Because the Court believes that this attestation was itself coerced, the Court can only conclude, based on the totality of the circumstances, that Czichray was in custody, and should have received *Miranda* warnings.

IL Voluntariness

It should be reiterated that the evidence at issue here is not the written statement, but the oral statements included in the FBI's 302 report. Although the coerced nature of Czichray's signature on the written statement helps prove that Czichray was in custody, it does not bear on whether the oral statements were also involuntary. These statements comprise at most nine paragraphs of a twelve page report, and deal only with Czichray's background, the finances of his business, his employees, and some of his associates.

No evidence has been presented that these particular statements were coerced. They seem to be mere background, and were not included by the agents in the "incriminating" written statement. Therefore, the Court can only conclude that these particular statements were voluntary.[2]

Based on the above findings, the Court determines that Czichray was in custody during the interview at his home on February 16, 2001. Because he was not advised

[2] Because these statements are voluntary, they are admissible for impeachment purposes against Czichray, even though they were obtained in violation *of Miranda. See Oregon v. Hass,* 420 U.S. 714, 722-23 (1975); *Mincey v. Arizona,* 437 U.S. 385, 397-98 (1987); *Houston v. Lockhart,* 866 F.2d 264, 266-67 (8th Cir. 1989).

his *Miranda* rights, his statements to the FBI agents must be suppressed. Accordingly, Czichray's objections to the Report and Recommendation will be sustained, and his motion to suppress will be granted.

ORDER

Based on the foregoing of all the records, files, and proceedings herein, the Court SUSTAINS defendant's objection [Docket No. 50] and REJECTS the Magistrate Judge's Report and Recommendation [Docket No. 49].

Accordingly, **IT IS HEREBY ORDERED** that defendant's motion 'to suppress statements [Docket No. 34] is **GRANTED**.

DATED: Jan. 7, 2002
at Minneapolis, Minnesota.

s/
JOHN R. TUNHEIM
United States District Judge

DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff,	Criminal No. 02-295 (JRT/RLE)
v.	
(1) HOWARD PINDYCK, (2) PHILLIP BRUNO, (3) MICHAEL CZICHRAY, and (4) LEONARD EVANGELIST, Defendants.	**MEMORANDUM OPINION AND ORDER**

John R. Math and Erica H. MacDonald, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415, for plaintiff.

Kevin J. Short, SHORT LAW OFFICE, 2890 Metropolitan Centre, 333 South Seventh Street, Minneapolis, Minnesota 55402, for defendant Howard Pindyck.

John C. Brink, BRINK & GERDTS, P.A., 401 Second Avenue South, Suite 840, Minneapolis, Minnesota 55401, for defendant Phillip Bruno.

Peter B. Wold, WOLD LAW OFFICE, 247 Third Avenue South, Minneapolis, Minnesota 55415, for defendant Michael Czichray.

Thomas Kelly, KELLY & JACOBSON, 220 South Sixth Street, Suite 215,. Minneapolis, Minnesota 55402, for defendant Leonard Evangelist.

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Defendants have been indicted for conspiracy, false statements, and fraud in connection with a health fraud investigation conducted by the Federal Bureau of Investigation ("FBI"). On May 2, 2003, United States Magistrate Judge Raymond L. Erickson issued a Report and Recommendation addressing several pre-trial motions. This matter is now before the Court on defendants' objections to the Report and Recommendation. The Court has conducted *a de novo* review of the objections pursuant to 28 U.S.C. § 636 (b)(1)(C) and D. Minn. LR 72.1(c)(2). For the reasons set forth below, the Court adopts in part and rejects in part the Report and Recommendation.

I. Evangelist's Motion to Suppress Statements of January 24, 2001

A. Factual Background - FBI Investigation of Evangelist

The FBI began investigating allegations of health care fraud by defendant Leonard Evangelist ("Evangelist") in November 1999. On January 24, 2001, FBI agents Todd Thompson ("Thompson") and Sean Boylan ("Boylan") went to Evangelist's home unannounced to conduct an interview.

At approximately 9:30 a.m. on January 24, Evangelist arrived at home in his automobile. He drove up his driveway and parked in the garage, activating the automatic garage door while still seated in the car. The agents, who had been waiting outside Evangelist's home in their vehicle, followed in their car and parked on Evangelist's driveway, behind his vehicle. Boylan stepped into the garage as the door was lowering, triggering a sensor which prevented the door from closing. Boylan then introduced himself and displayed his credentials. Evangelist agreed to let the agents into his house.

Once inside, Evangelist, Boylan, and Thompson sat

in Evangelist's dining room. Boylan explained to Evangelist that the interview was consensual and that he was not under arrest. Boylan then told Evangelist some of the incriminating information that the FBI had gathered through its investigation. The agents' apparent goal was to convince Evangelist to cooperate with their investigation.

Thompson and Boylan spoke with Evangelist for approximately six hours, until around 3:35 p.m. During the interview, Evangelist got up from the table and stepped onto his deck to smoke. Evangelist also cleaned a coffee pot in the kitchen, used the restroom, and put his dog into the garage. When Evangelist expressed a desire to use the restroom, Thompson escorted him, explaining that he was doing so to preserve the agents' safety. After inspecting the bathroom to determine whether it contained any weapons, Thompson left the room. A similar procedure was followed when Evangelist put his dog in the garage. Twice during the interview, Evangelist received phone calls from his clinic. Both times, Evangelist spoke to the callers and, during the second call, informed the caller that he would report to the clinic at approximately 3:00 p.m.

At approximately 2:30 p.m., Evangelist expressed concern that his wife and daughter would soon be returning home. Evangelist apparently offered to continue the interview at a nearby public library. At this point, the agents contacted a third FBI agent, Timothy Bisswurm ("Bisswurm"), and asked him to come to Evangelist's house. Thompson testified that while waiting for Bisswurm to arrive, Evangelist provided information about fraudulent bills submitted to insurance companies. When Bisswurm arrived, he recorded some background information from Evangelist. Meanwhile, Boylan and Thompson apparently conferred to discuss whether and how to continue the interview, eventually deciding to accept Evangelist's offer to do so at the library.

Evangelist drove himself to the library, accompanied

in the vehicle by Boylan. Thompson and Bisswurm followed in separate vehicles. Once at the library, the group sat in the children's section. Boylan withdrew to prepare a written statement for Evangelist's signature, while Thompson telephoned his supervisor. Meanwhile, Bisswurm continued to take background information from Evangelist. When Boylan completed the statement, Evangelist was reminded that the interview was consensual, and was told that his signing of the statement was voluntary. Evangelist read the statement, made some corrections, and signed the document. The written statement affirmed that he had read, understood, and agreed with its contents. Thompson and Boylan also signed the statement. The agents and Evangelist then departed the library separately.

At approximately 7:15 p.m. that evening, the agents and Evangelist met again, this time at Evangelist's clinic. The clinic was closed at that time. Evangelist apparently agreed to meet the agents at the clinic to review information in his files. At the clinic, the agents and Evangelist sat in his office, where Evangelist consulted files and identified additional information for the agents. Evangelist gave the agents a tour of his clinic, and gave the agents permission to photocopy a list of patients who had been at the clinic that day. This second interview concluded at approximately 9:00 p.m.

The agents requested a third meeting with Evangelist for the following morning, January 25, 2001. Upon Evangelist's suggestion, they met at a Burger King restaurant. At that meeting, Evangelist agreed to cooperate with the FBI's investigation. He signed a consent form, giving the FBI permission to install a recording device on any phone he used. Thompson testified that he and the other agents met with Evangelist approximately eight more times, sometimes at the Burger King and sometimes at Evangelist's clinic.

The FBI agents all testified that Evangelist never

asked for an attorney. Thompson did add that Evangelist once asked whether he needed an attorney, and that he responded that such a decision was for Evangelist to make.

B. Analysis

Evangelist claims that all the information he provided stems from an unlawful arrest on January 24, 2001, the date he first met with FBI agents. He claims that the FBI agents unlawfully entered his home, then held him under arrest without advising him of his rights pursuant to *Miranda v. Arizona,* 384 U.S. 436 (1966). Evangelist argues that all the information garnered at that interview and subsequent interviews must therefore be suppressed. The Magistrate Judge found that the evidence should not be suppressed, and Evangelist now objects.

1. Entry to Evangelist's Garage

Evangelist first argues that Boylan's entry into his garage before obtaining consent to enter the premises constitutes a violation of the Fourth Amendment. Although the agents did not enter Evangelist's home without consent, they did enter the garage, which is part of the home's curtilage and to which Fourth Amendment protections extend. *See United States v. Raines,* 243 F.3d 419, 421 (8th Cir. 2001); *United States v. McCaster,* 193 F.3d 930, 932 n.3 (8th Cir. 1999) (noting that curtilage includes any land or building immediately adjacent to a dwelling); *Drummond v. United States, 350* F.2d 983, 989) 8th Cir. 1965) (holding that the curtilage of a home includes a garage). Although Evangelist began closing the door before Boylan entered the garage, Evangelist does not claim - and no evidence suggests - that he closed the door in order to exclude the agents.

Evangelist argues that because the agents initially entered his garage without permission, all the information obtained in the eight or more instances in which he met with the agents was obtained illegally and must be suppressed. The Magistrate Judge found that Evangelist's inviting the agents

into his home demonstrated consent, and gave the agents "a reasonable basis to believe that their entry into Evangelist's garage was unobjectionable." (R&R at 37-38.) Thus, the Court must consider two questions: (1) whether the agents' entry into Evangelist's garage was legal; and (2) if it was not, whether Evangelist's subsequent consent to the agents' presence purged the prior taint.

"The test for determining whether an officer has exceeded the scope of a suspect's consent to enter the suspect's premises `is that of `objective' reasonableness - what would the typical reasonable person have understood by the exchange between the officer and the suspect? *United States v. Phelps,* 168 F.3d 1048, 1057 (8th Cir. 1999) (quoting *Florida v. Jimeno,* 500 U.S. *248,* 251 (1991)). Using this test, the Magistrate Judge concluded that the agents had an objectively reasonable belief that their presence was acceptable. However, the "objective reasonableness" test is of limited utility in this case because it presumes that the officers acted **after** receiving some form of consent. Indeed, cases applying this test generally involve circumstances in which the consent at issue was given prior to whatever action officers eventually took. *See, e.g., Phelps,* 168 F.3d at 1057 (applying test where officers entered home only after being given putative permission by defendant); *United States v. Hampton,* 260 F.3d 832, 833-35 (8th Cir. 2001) (finding that warrantless arrest was proper because it occurred after defendant allowed police to enter his home); *United States v. Shabazz,* 883 F. Supp. 422, 426 (D. Minn. 1995) (finding that agents had implied permission to enter after defendant left her apartment door open for them); *United States v. Garcia,* 56 F.3d 418, 422-24 (2d Cir. 1995) (finding that police had objectively reasonable belief that defendant consented to their entry after door to residence had been opened for them). In this case, however, it is undisputed that the agents entered the garage **before** Evangelist gave any consent. The Magistrate Judge's analysis rests on the fact that "**[a]fter** the initial

contact with Evangelist, the FBI Agents were not commanded, nor escorted out of his garage but, in fact, [were] invited into the privacy of [Evangelist's] home ...." (R&R at 37 (emphasis added)) As will be discussed, this subsequent consent may purge the taint of an illegal entry, but it does not prove that the initial entry itself was proper.

The evidence here is undisputed that Evangelist drove into his garage and began to close the automatic garage door. While attempting to enter the garage, Boylan prevented the garage door from closing, enabling the agents to enter before receiving any consent from Evangelist. It is not difficult for the Court to determine the "scope" of Evangelist's consent under the "objective reasonableness" test, because he gave no consent at all. Thus, it was impossible for the agents to reasonably believe that Evangelist was consenting to their entry into his garage. Moreover, neither the government nor the Magistrate Judge present any authorities to demonstrate that the agents' entry was reasonable or proper.[1] The Court therefore concludes that the agents' initial entry into Evangelist's garage was improper.

Even though this entry was improper, courts have recognized that such a taint can be purged through

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[1] The Magistrate Judge cites two conflicting state cases, one of which held that entry into a garage was indistinguishable from stepping onto a porch to knock on a front door, *Tracht v. Commissioner of Pub. Safety,* 592 N.W.2d 863, 865 (Minn. Ct. App. 1999), and the other holding that "no reasonably respectful citizen" would feel free to enter a garage without the owner's consent, *State v. Dyreson,* 17 P.3d 668, 673 (Wash. Ct. App. 2001). The Magistrate Judge noted that *Tracht is* distinguishable from the present case because here, Boylan affirmatively prevented Evangelist's garage door from closing. (R&R at 34.) Nevertheless, the Magistrate Judge concluded that "the result, which was reached in *Tracht, is* most consistent with the law of this Circuit." (R&R at 35.) The Report and Recommendation provides no authority and cites to no Eighth Circuit or other case law to support this conclusion. Therefore, the Court finds that these state cases lend no authority, persuasive or otherwise, to this issue.

subsequent acts or events. To determine whether Evangelist's subsequent statements to the FBI retain the taint of the agents' illegal entry, the Court must consider the following three factors: (1) the temporal proximity of the illegality and the statements; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the agents' misconduct. *Brown v. Illinois,* 422 U.S. 590, 603-04 (1975); *United States v. Moreno,* 280 F.3d 898, 900 (8th Cir. 2002); *United States v. Yousif,* 308 F.3d 820, 830 (8th Cir. 2002). Upon evaluating the *Brown* factors, the Court finds that the taint of the FBI agent's initial misconduct in this case was purged.

First, as the Magistrate Judge found, a significant amount of time passed between Boylan's initial entry to the garage and Evangelist's subsequent statements to the agents. Boylan entered the garage at approximately 9:30 a.m., and Evangelist signed a written statement at 3:30 p.m., approximately six hours later. Evangelist made further statements later that same evening and in subsequent days. In *Moreno,* a state trooper illegally stopped the defendant, issued a ticket and asked for permission to search the car. *Moreno, 280* F.3d at 899-900. After this roadside search proved fruitless, the trooper asked permission, and the defendant consented, to tow the car to a service station for a more thorough search. *Id.* at 900. The Eighth Circuit held that sufficient time had passed between the illegal stop and the defendant's consent to the second search. *Id.* at 901. Although *Moreno* does not specify how long that interval was, the roadside search presumably took less than the six hours that elapsed here between Boylan's initial entry and Evangelist's written statement.

Second, there were intervening circumstances to mitigate the agents' Fourth Amendment violation. For example, Evangelist invited the agents into his home, and the agents told Evangelist that he was not under arrest. Furthermore, after the interview hadgone for several hours, Evangelist agreed to continue the interview at a nearby public

library, and he drove himself to meet with the agents again that night and on subsequent days. In *Moreno,* the Eighth Circuit held that the trooper's telling the defendant that he had the right not to consent to the search constituted an intervening circumstance. *Id.* In this case, the Court agrees with the Magistrate Judge that Evangelist's "independent, voluntary acts" served as intervening circumstances that help purge any taint of illegality.

Finally, the Court finds no evidence that the agents' illegal entry into Evangelist's garage was motivated by bad faith, was flagrant, or was intended to violate any of Evangelist's rights. Nor does Evangelist suggest that the agents intended to violate his rights. Therefore, upon considering all the *Brown* factors, the Court concludes that any taint from the agents' illegal entry into Evangelist's garage was purged by the passage of time and Evangelist's consent. Accordingly, Evangelist's statements may not be suppressed on Fourth Amendment grounds.

2. Interrogation in Evangelist's Home

Evangelist objects to the Magistrate Judge's determination that he was not in custody on January 24, 2001. Evangelist argues that once the agents were in his home, he was in their custody and therefore should have been read his *Miranda* rights. Because he was not read his rights, Evangelist contends, all statements made in that interview and in subsequent meetings with the FBI should be suppressed.

a. Legal Standard

A person "must be advised of the right to be free from compulsory self-incrimination, and the right to the assistance of an attorney, any time that a person is taken into custody for questioning." *United States v. Griffin,* 922 F.2d 1343, 1347 (8th Cir. 1990). A suspect is "in custody" for purposes of *Miranda* upon arrest, or when the suspect is "deprived of his freedom of action in any significant way."

Miranda, 384 U.S. at 444; *United States v. Axsom,* 289 F.3d 496, 500 (8th Cir. 2002). To make this determination, the Court must consider whether a reasonable person in the suspect's position would have understood the situation to be one of custody. *Berkemer v. McCarty,* 468 U.S. 420, 442 (1984); *Axsom,* 289 F.3d at 500. The Court must make this objective determination by looking at the totality of the circumstances. *Griffin,* 922 F.2d at 1347.

Eighth Circuit has identified six relevant factors for courts to consider when determining whether, under the totality of circumstances, a suspect is in custody. *See id.* at 1349. They are:

> (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest;
>
> (2) whether the suspect possessed unrestrained freedom of movement during questioning;
>
> (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions;
>
> (4) whether strong arm tactics or deceptive stratagems were employed during questioning;
>
> (5) whether the atmosphere of the questioning was police dominated; [and],
>
> (6) whether the suspect was placed under arrest at the termination of the questioning.

Id. These six factors are representative, not exclusive. *Axsom,* 289 F.3d at 501. "A finding of custody does not require the factual circumstances of a case to present all indicia; and a particularly strong showing of one factor may compensate for a lesser or non-existent showing of another

factor." *Id.*

The Eighth Circuit has described the first three factors as "mitigating factors which, if present, mitigate against the existence of custody," and the last three factors as "aggravating factors" which, if present, make it more likely that the suspect was in custody. *Axsom,* 289 F.3d at 500-01.

b. Custody

Evangelist claims that the agents effectively arrested him in his home on January 24, 2001. The Court considers the six *Griffin* factors to determine whether Evangelist was in custody.

i. Advice Given by Agents

Evangelist concedes that the agents told him that the questioning was voluntary and that he could tell them to leave at any time. Evangelist argues that the agents' actions were inconsistent with these words, and that their preventing the garage door from closing caused the meaning of their words to be "lost" on him. (Evangelist Obj. at 5.) Whether the agents' actions were inconsistent with their statements is important, and upon considering the totality of circumstances may lead to a conclusion that the statements were negated by the agents' behavior. However, for the purposes of this factor, the Court should consider only whether the agents informed Evangelist that the interview was voluntary. The evidence clearly shows that they did, so this factor weighs against a finding of custody.

ii. Freedom of Movement

Evangelist contends that his freedom of movement was restrained because he was "accompanied virtually everywhere he went in his own home, outside, inside, and downstairs." (*Id.*) The record shows that the agents did escort Evangelist when he put his dog in the garage and when he used the restroom, and that they informed Evangelist they were doing so to check for weapons and to ensure agent safety. *(See* 11/22/02 Tr. at 54-55, 161.)

Evangelist does not contend that such escorts were for any other purpose. Otherwise, the record suggests that Evangelist was free to move within his home and to use the telephone, even though most of the time he was within sight of the agents. (*See id.* at 154-56.) It is well established that escorting suspects for agent safety does not restrain a suspect's movement in such a way as to indicate that the suspect was in custody. *See Axsom,* 289 F.3d at 502-03; *Griffin,* 922 F.2d at 1350. Because the uncontroverted evidence shows that Evangelist was escorted for purposes of officer safety, the Court concludes that "his freedom was not restrained to a `degree associated with formal arrest.'" *Axsom,* 289 F.3d at 502 (quoting *California v. Beheler,* 463 U.S. 1121, 1125 (1983) (per curiam)). This factor also weighs against a finding of custody.

iii. Who Initiated Contact

The interview on January 24, 2001 was clearly initiated by the FBI agents. However, it is also apparent that Evangelist voluntarily acquiesced to the agents request to answer questions. Not only did Evangelist affirmatively invite the agents into his home, he agreed to move the interview to a different location when he became concerned that his wife and daughter would be returning home, even suggesting the location where they could continue the interview. Evangelist's cooperation with the agents later that evening and on subsequent occasions, when he drove himself to meetings with agents, also suggests that he voluntarily acquiesced to agent questioning. *See id.* (finding that defendant who was "friendly and cooperative" during the interview voluntarily acquiesced to questioning). Thus, because Evangelist voluntarily acquiesced to this agent-initiated contact, this factor weighs against a finding of custody.

iv. Tactics Used by Agents

Evangelist contends that the agents used strong-arm

coercive tactics during the interview by "[s]uggesting intimate awareness of Evangelist's personal life," and by discussing "the public arrest of non[-]cooperating witnesses, the alleged widespread nature of criminal activity involved, and the loss of employment." (Evangelist Obj. at 6.) These are not coercive measures, and the Court agrees with the Magistrate Judge that the record contains no evidence of the agents using strong-arm tactics or deceptive stratagems. The Court thus finds that this factor does not aggravate the circumstances in favor of finding custody.

v. Domination of the Interview

Evangelist next argues that the interview on January 24, 2001 was conducted in a police-dominated environment. The Court disagrees. As discussed above, Evangelist voluntarily acquiesced to the agents presence and questions, and he maintained relative freedom of movement within his home. Furthermore, when he became concerned that his wife and daughter might arrive home during the interview, he did not end the interview, but suggested that the interview could continue at the public library. Given Evangelist's degree of autonomy during the interview, the Court would be hard-pressed to find that the environment was agent-dominated. This factor therefore does not aggravate the circumstances.

vi. Arrest

It is undisputed that Evangelist was not arrested at the conclusion of the interview.

vi. Totality of the Circumstances

Upon reviewing the six *Griffin* factors, the Court finds that all of the mitigating factors are present, and none of the aggravating factors are present. Thus, upon reviewing the evidence and considering the totality of the circumstances, the Court concludes that Evangelist was not in custody during the interview on January 24, 2001. The agents were therefore not required to advise him of the *Miranda* warnings.

c. Voluntariness

Even if *Miranda* warnings are not required, Evangelist's statements may be entered into evidence only if they were voluntary. The test for determining whether a confession is voluntary is "whether, in light of the totality of the circumstances, pressures exerted upon the suspect have overborne his will." *United States v. Merirovitz,* 918 F.2d 1376, 1379 (8th Cir. 1990). The Court agrees with the Magistrate Judge that Evangelist has pointed to no evidence suggesting that his will was overborne. To the contrary, as discussed above, all the evidence suggests that Evangelist was a willing and voluntary participant in the interview on January 24, 2001, and in the subsequent interviews. The Court therefore concludes that Evangelist's statements were voluntary.

Because Evangelist was not in custody and his statements to the FBI agents were voluntary, there is no reason to suppress his statements. Therefore, Evangelist's motion to suppress will be denied.

II. Czichray's Motion to Suppress Statements of February 16, 2001

Czichray's motion to suppress is unique because the facts underlying his motion have already been considered by this Court in a previous case. In that case, a criminal prosecution for bank fraud against Czichray alone, this Court held that Czichray was in custody during an interview with Boylan and Bisswurm on February 16, 2001, that he should have received the *Miranda* warnings, and that his waiver of *Miranda* rights was coerced. *See United States v. Czichray,* Crim. No. 01-307, 2001 WL 54504 at *5 (D. Minn. Jan. 7, 2002) *("Czichray I"* This case deals with the identical factual situation, but the legal posture is slightly different.

In *Czichray I,* the Court granted Czichray's motion to suppress oral statements he made to the agents, which were included in the FBI report of the interview. Here, the

evidence at issue is not those oral statements, but the written statement that Czichray signed at the conclusion of the interview. This written statement was not at issue in *Czichray I.* It figured prominently in the Court's consideration, however, because Czichray's waiver of his *Miranda* rights in that statement was the basis for Magistrate Judge Noel's recommendation in that case that the evidence not be suppressed. On objections to Magistrate Judge Noel's recommendation, this Court concluded that Czichray was in custody and that his *Miranda* waiver was coerced. Thus, his oral statements were suppressed. The Court did not specifically decide whether the written statement must also be suppressed because that question was not presented. That precise question is now before the Court.

The Magistrate Judge in this case, Magistrate Judge Erickson, examined the same circumstances that served as the basis for the Court's ruling in *Czichray I,* and determined that Czichray was not in custody on February 16, 2001, that his waiver of *Miranda* was voluntary, and that his statements should not be suppressed. The Court has thoroughly reviewed the transcripts of testimony before both Magistrate Judges and has reviewed Eighth Circuit case law announced since the ruling in *Czichray I.* Upon this examination, the Court finds no law or facts to change its earlier determinations that Czichray was held in custody on February 16, 2001, that he was improperly denied his *Miranda* rights, and that he was coerced into signing a waiver of those rights.[2] For the reasons discussed below, the

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[2] The Magistrate Judge incorrectly states that this Court "characterized the suppression question as `a very close issue'" in *Czichray I. (See* R&R at 57 n.33.) This Court made no such statement, and did not characterize the overall question of suppression as "a very close issue." The Magistrate Judge may be referring to this Court's statement that "it is a close question whether or not threats to `light up' the life of Czichray's father and interfere with his business constitute strong arm tactics." *Czichray I,* Crim. No. 01-307, 2001 WL 54504 at *4.

Court thus rejects the Magistrate Judge's Report and Recommendation on this ground.

A. Factual Background - FBI Interview of Czichray[3]

It is clear, however, that this statement referred to the specific issue of strong arm tactics, not the overall question of suppression.

The Magistrate Judge might also be referring to Magistrate Judge Noel's statement in his Report and Recommendation that reviewing the totality of the circumstances on the question of custody presents "a very close and difficult question." *Czichray I,* Report and Recommendation, slip op. at 9 (D. Minn. Dec. 19, 2001) ("Noel R&R"). Magistrate Judge Noel ultimately resolved this question in favor of suppression. *Id.* at 10.

[3] The relevant record for this motion consists of testimony by Boylan, Bisswurm, and Czichray before Magistrate Judges Noel and Erickson. Magistrate Judge Noel heard testimony from Boylan, Bisswurm, and Czichray on November 14, 2001 and December 13, 2001. Magistrate Judge Erickson heard testimony from Boylan and Bisswurm on November 22, 26, and 27, 2002. Although Magistrate Judge Erickson reviewed all the previous testimony before Magistrate Judge Noel, he did not hear first-hand testimony from Czichray.

As Magistrate Judge Noel noted, the agents' testimony conflicts "in material respects with Czichray's testimony." Noel R&R at 2. This Court must therefore base its ruling, in part, upon the witnesses' credibility. In discussing his own credibility determinations, Magistrate Judge Erickson noted that Magistrate Judge Noel "was not impressed by Czichray's believability.' (R&R at 72. n.39.) The record does not support this characterization. It is true that Magistrate Judge Noel found Czichray's statement that he did not read the written statement before signing it "incredible." *(See* Noel R&R at 10 n.3). However, this does not represent Magistrate Judge Noel's overall view of Czichray's credibility. Magistrate Judge Noel stated that his description of the February 16 interview reflected his credibility determinations. *(Id.* at 2.) Thereafter, his description of several crucial instances accepts - often explicitly - Czichray's version of the facts over that of the agents. *(See id.* at 4-5.) Thus, it is clear from Magistrate Judge Noel's Report and Recommendation that although he did not believe at least one of Czichray's statements, in many other instances he found Czichray to be more credible than the agents.

At approximately 4:30 a.m. on February 16, 2001, Bisswurm telephoned Czichray's home to determine whether Czichray was in the house. Bisswurm did not identify himself, but said that he had the wrong number. At approximately 6:30 a.m., Bisswurm and Boylan arrived at Czichray's house, and either rang the doorbell or knocked on the door. There was no response, but the agents could see through a window that the television and lights were on in the house. The agents returned to their vehicle and called Czichray's house again. When Czichray answered the phone, Boylan told Czichray that he needed to come to the front door. Boylan stated his name but did not identify himself as an FBI agent. Czichray, wearing boxer shorts and a t-shirt, opened the front door, where the agents were standing with their identification. Boylan identified himself and Bisswurm as FBI agents, and said that they would "like to take a few minutes of [Czichray's] time, like to give him some information, and he doesn't have to, if he doesn't want to, talk to us, but we'd like to give him this information." (11/14/01 Tr. at 16.) The agents added that "when we're done, we're going to have to go on our way, and [Czichray has] other business of the day, that we're unaware of, that he's going to have to take care of." (*Id.*) Czichray let the agents in the house.

The agents and Czichray sat down in the living room. (*See* 12/13/01 Tr. at 34-35.) Boylan again told Czichray that the interview was voluntary, that both agents had "other business to take care of' that day, and that they were "sure [Czichray] does, too, because he's a busy man." (11/14/01 Tr. at 16.) Boylan told Czichray that when the interview was over, the agents would leave, and Czichray could "take care of whatever he has to do for the rest of the day." *(Id.* at 16-

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This Court's findings of fact here reflect its own credibility determinations made upon an independent, *de novo* review of all the testimony, taking into consideration the credibility determinations made by both Magistrate Judges.

17.) Boylan then began a lengthy monologue about the FBI's health care fraud investigation, how it implicated Czichray, and the investigative power of the FBI.

During the interview, the agents told Czichray that they knew his 75-year-old father lived next door, and that if Czichray did not cooperate, the agents would interview his father and others. Specifically, the agents threatened that the interviews would "light up his world," which apparently means that the interviews would enlighten Czichray's father and others to Czichray's allegedly fraudulent activities. *(See* 11/26/02 Tr. at 59.) The agents also suggested that if Czichray did not cooperate, they could use the power of the FBI to prevent insurance companies from making legitimate payments to his business.[4] (12/13/01 Tr. at 43.) Czichray testified that he understood "cooperate" to mean that he "had to listen to what [Boylan] was saying to me. Couldn't tell him to leave. I had to do what they said and agree to what they were telling me." (*Id.* at 44.)

At approximately 9:30 a.m., Czichray, still in his underwear, told the agents that he was late for work. The agents directed Czichray to call in sick so that the interview could continue. (12/13/01 Tr, at 38, 51.) Czichray called in sick, and at the agents' direction, did not inform his office that he was being questioned by the FBI.[5] As the interview continued, Czichray's home phone and cellular phone rang many times, but, acting upon instructions from the agents, Czichray did not answer the phone. *(See* 12/13/01 Tr. at 39.) At some point during the nearly seven-hour interview,

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[4] The agents denied making such threats. (*See* 11/26/02 Tr. at 60; 11/27/02 Tr. at 144-45.)

[5] The agents claimed that they merely "suggested" that Czichray call in sick and that he not tell anyone the FBI was speaking with him. (*See* 11/ /14/01 Tr. at 24, 41; 11/26/02 Tr. at 61; 11/27/02 Tr. at 81.) Boylan conceded, however, that it was his own idea for Czichray to tell his office that he was sick. (*See* 11/27/02 Tr. at 81.) The Court determines that the Czichray took these actions at the direction of the agents.

Czichray asked to use the restroom. Boylan responded by asking if there was a phone in the restroom. He then accompanied Czichray to the restroom and checked it before allowing him to use the restroom. *(See* 11/26/02 Tr. at 64-66.) A similar procedure was followed when Czichray asked to put on some pants. Czichray was escorted, walking backwards, to his bedroom, where he was allowed to put on pants. *(See* 12/13/01 Tr. at 41.)

While being interviewed, Czichray made several incriminating statements that related to the health care fraud investigation. The agents drafted a handwritten statement summarizing this information (the "written statement"), which Czichray initialed on each page and signed. Czichray also made one correction to the statement. The written statement includes a provision that "no one has threatened, coerced or promised me anything." Czichray testified that he was in fact coerced into signing the document, while the agents testified that Czichray signed it voluntarily. After Czichray signed the written statement, the agents left his residence. At no point during the interview did the agents advise Czichray of his rights under *Miranda.* The agents never handcuffed Czichray nor displayed any weapons. Czichray was not placed under arrest at the conclusion of the interview.

B. Analysis

1. Law of the Case and Collateral Estoppel

Czichray first objects to the Report and Recommendation on the basis that the Magistrate Judge's independent consideration of this evidence is barred by the Court's ruling in *Czichray I.* The Court disagrees, and finds that neither the doctrines of law of the case nor collateral estoppel apply here.

The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues **in subsequent stages in**

the same case." *Arizona v. California,* 460 U.S. 605, 618 (1983) (emphasis added); *Harbor Ins. Co. v. Essman,* 918 F.2d 734, 738 (8th Cir. 1990). Some courts have suggested that the doctrine applies to separate actions with similar circumstances. *See, e.g., Casey v. Planned Parenthood of Southeastern Pa.,* 14 F.3d 848, 856 n.11 (3d Cir. 1994). The Eighth Circuit has clearly held, however, that the law of the case doctrine does not apply in separate actions, even where the second case involved the same parties and the same claim. *Harbor Ins. Co.,* 918 F.3d at 738. *See also* Charles A. Wright, Arthur R. Miller & Edward H. Cooper, 18B *Federal Practice & Procedure: Jurisdiction & Related Matters* § 4478 (2003 Supp.) (stating that law of the case rules "do not apply between separate actions"). The Court thus rejects Czichray's law-of-the-case arguments.

The Court also rejects Czichray's contention that the Magistrate Judge's recommendation is barred by the doctrine of collateral estoppel.[6] The government argues that collateral estoppel does not apply to criminal matters that do not involve double jeopardy, such as this suppression motion. *(See* Govt. Ex. 1 at 3-6.) Even if this doctrine does apply, however, the Court finds that it would not bar reconsideration of the ruling in *Czichray I* because the legal issues in the two cases are not identical. "The doctrine of collateral estoppel prevents litigation of an issue **when the identical issue was actually litigated** in and necessary to the decision in a prior proceeding concluded by a valid and final judgment." *United States v. Young,* 804 F.2d 116, 117 (8th Cir. 1986) (emphasis added). As discussed above, in *Czichray I* the issue was whether to suppress Czichray's oral statements contained in the FBI's report. Here, the Court must decide whether to

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[6] The Magistrate Judge determined that Czichray had abandoned this argument. Czichray asserts otherwise. Because Czichray clearly raised the argument below and because the government addresses it, the Court evaluates the issue of collateral estoppel as part of its *de novo* review.

suppress the written statement containing Czichray's admissions. Thus, because the issues in *Czichray I* and this case are not identical, collateral estoppel does not bar consideration of suppression.

2. Merits-Custody

Czichray objects to the Magistrate Judge's determinations that he was not in custody during the interview on February 16, 2001, and that his waiver of *Miranda* rights through the written statement was voluntary. Czichray thus maintains that the written statement must be suppressed because he was in custody without being informed of his *Miranda* rights, and that his waiver of those rights was coerced. The Court applies the six *Griffin* factors to determine whether Czichray was in custody during the February *16* interview.

a. Advice Given by Agents

Czichray does not genuinely contest that Boylan and Bisswurm told him the interview was voluntary. As the Magistrate Judge noted, it is clear from the record that the agents informed Czichray several times that he could refuse to speak with them, and that he could tell them to leave. Therefore, this factor would tend to mitigate any finding of custody.

b. Freedom of Movement

Czichray objects to the Magistrate Judge's determination that his freedom of movement was "unrestrained" during the interview. (*See* R&R at 59.) This factor represents one of the major differences between the Magistrate Judge's findings and this Court's previous determination in *Czichray I.* The Magistrate Judge was "unable to find that the Agents `instructed' Czichray to call in sick..., `prevented' Czichray from using the bathroom unaccompanied, or `directed' Czichray not to answer the phone." (*Id.*) Instead, the Magistrate Judge concluded that the

agents

> **suggested,** to Czichray, that he call in sick, that he not tell anyone he was speaking with the FBI, and that, if he were to cooperate with the FBI, the Agents would have to assure that the bathroom, which Czichray wanted to visit, did not present issues of officer safety, and did not contain a telephone.

(*Id.* (emphasis added).) At issue here are two principal restrictions of Czichray's freedom - his ability to use the telephone, and his ability to move about his home. The Magistrate Judge acknowledged that an FBI agent "accompanyied [sic] Czichray to the bathroom" and "follow[ed] Czichray around his home." (*Id.* at 59-60.) He concluded, however, that the agents did so legitimately, finding that "the stated purpose for following Czichray around his home was officer safety, as well as to monitor Czichray's access to any means by which he might communicate with anyone other than the agents." (*Id.* at 60.)

The Magistrate Judge contrasted these purposes with that for which Evangelist was escorted; when Evangelist wanted to use the restroom during his interview, he was told that he must be escorted for officer safety and to make sure no weapons were available. (*See id.*) The Magistrate Judge thus concluded that "not only it is significant that the Agents had somewhat **different purposes in mind** [for escorting Evangelist and Czichray], it is equally significant that those divergent purposes were communicated to Evangelist, and to Czichray, respectively." (*Id.* (emphasis added).)

Thus, under the Magistrate Judge's rubric, Evangelist was escorted for officer safety, and he was told so; Czichray was escorted for officer safety and to prevent him from using the phone, and he was told so. (*See id.* at 61.) The Magistrate Judge stated that just because Czichray's escort was not

solely for officer safety does not invalidate it. This analysis is flawed for two reasons. First, there is no evidence in the record that the agents told Czichray he was being escorted for officer safety. Second, the agents' actions during the interview negated their verbal assurances that Czichray's participation in the interview was purely voluntary.

First, although the Magistrate Judge stated that the agents told Czichray they were escorting him to "ensure their safety,"[7] the Court can find no evidence that the agents ever communicated this to Czichray. Of course, there is no strict requirement that Czichray be informed of the purpose for this escort. However, the record is clear that the agents did tell Czichray one purpose of the escort - to prevent him from using the telephone. The rationale of "agent safety" only appears in the agents' later explanations to the Court.[8] Although the agents both testified that the escort was for officer safety, they did not testify that they communicated this to Czichray. Thus, the agents' testimony before both Magistrate Judges demonstrates that although in court they recited "officer safety" as their reason for the escort, their true concern was preventing Czichray from communicating with anyone else.

Upon direct examination by the prosecution before Magistrate Judge Erickson, Boylan testified at length about

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[7] The Magistrate Judge stated that "the purpose that was communicated to Czichray for the Agents' desire to escort him . . . **was to ensure their safety** and the integrity of their investigative efforts, as they did not want Czichray to communicate, to others, that he was being investigated . . . ." (R&R at 60-61 (emphasis added).)

[8] This is in stark contrast to Evangelist's case, in which Thompson escorted Evangelist around his home, telling Evangelist that the escort was "just for the purpose of officer safety, to make sure that there were no weapons available." (11/22/02 Tr. at 55.) Thompson testified that when Evangelist used the restroom, he "took a look inside the bathroom to see if I saw anything that would be threatening to us as agents ...." (*Id.*)

his concerns for officer safety.[9] Boylan elaborately described his fears for his safety, suggesting that Czichray, a large man, might react rashly and overpower him, or might have a

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[9] Boylan testified:

> A: Well, my concern at that point is I'm dealing with a man that we had information on that can - he is likely guilty of some type of health care fraud violation which is going to be a felony which carries jail time. I don't know what else this guy has done. I'm not sure if he's committed some other crimes because we don't have the whole background on any individual we talk to. I do know from our evidence at that point that he's likely guilty of something or at least the evidence is pointing that way. So now I have a man that is the size that Mr. Czichray is who's probably in the neighborhood of 280 [pounds]. He's a big guy. I'm in his residence. I don't know what he has in terms of weapons or no weapons. I don't know where those weapons may or may not be, even if he has them. So now he's asking me - because I'm coming to talk to a man that is admitting guilt which carries probably jail time or potential jail time. I don't know how he's going to react to that. **I don't know if he's going to go in the back room and pull out a gun and blow his brains out or if he's going to go in the back room and pull out a gun and come and blow my brains out. So I asked him - before he used the bathroom I asked him if he would mind if I'd take a look and see if he had any telephones in there.** And one of the reasons he was asked if he's got any telephones in there is if he's going to cooperate I want to make sure that he knows that if he calls somebody else and says the FBI is out here it's going to be difficult for him to cooperate because everybody will know and that will limit his cooperation. So I asked him if he had any telephones back there and if he'd mind if I would go back and do a cursory check type of thing. He says yes, that type of language. I walk back. I look in the bathroom. I walk back out. He says something along the lines of do you want to watch me go to the bathroom. I said no. So he goes in the bathroom and closes the door.

(11/26/02 Tr. at 64-66 (emphasis added).)

hidden weapon with which he could "blow [someone's] brains out." (11/26/02 Tr. at 65.) In response to this concern for agent safety, however, Boylan's only action was to "take a look and see if [Czichray] had any telephones in there." (*Id.*) Boylan did not search the many places in a bathroom where Czichray could have hidden a weapon to "blow his brains out," but rather conducted what he described as a "cursory check" and what Bisswurm described as a "quick peek" into the bathroom. (*Id.* at 66; 11/27/02 Tr. at 148.) The Court thus finds it incredible that Boylan escorted Czichray to the bathroom to search for weapons or out of a concern for safety. [10] Rather, Boylan's own testimony reveals that his true concern was looking for a telephone to make sure that Czichray did not place any outside calls.

Bisswurm's testimony bolsters this conclusion. When asked to "explain the circumstances surrounding" Czichray's use of the restroom, Bisswurm said nothing about weapons or agent safety, but he did note that the agents were concerned about telephones:

> A: Dr. Czichray at some point stated he needed to use the rest room. We said that's fine. Agent Boylan asked him if he had a telephone in there. Dr. Czichray said he did not. Agent Boylan walked with him to the restroom, took a quick peek into the restroom and then stood outside in the hallway.

(11/27/02 Tr. at 148.)

As discussed above, agent safety can be a legitimate reason to restrict a suspect's movements. *See Axsom*, 289 F.3d at 502-03. However, nothing in the agents' descriptions

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[10] Boylan testified that "early on" in the interview, the agents conducted a walk-through of the house, ostensibly to ensure that there were no immediate threats to their safety. (*See* 11/14/01 Tr. at 44.)

of the interview - except their post-hoc rationalizations - supports their argument that they acted out of concern for safety. The Court therefore concludes that the only credible reason the agents gave for escorting Czichray around his house was to prevent his free use of the telephones.

The Court further determines that this restriction was improper, given the ostensibly voluntary nature of the interview. As the Magistrate Judge stated, the agents wanted to "monitor Czichray's access to any means by which he might communicate with anyone other than the Agents." (R&R at 60.) The Magistrate Judge found that this was permissible, because the agents "did not want Czichray to communicate, to others, that he was being investigated, which could have undermined their efforts to obtain his cooperation, or could have prompted the destruction of relevant evidence." *(Id.* at 61.) The Magistrate Judge cited *Axsom* to support his conclusion, finding that the agents properly restricted Czichray's communications to "protect the integrity of the search." *(Id.* (citing *Axsom,* 289 F.3d at 503).) That case, however, does not support the Magistrate Judge's conclusion.

In *Axsom,* federal agents executed a search warrant on the defendant's residence. *Axsom,* 289 F.3d at 497. Upon entering, the agents observed numerous weapons lying about the residence, including "fifteen shotguns and rifles lying on a kitchen table, another loaded firearm, three Samurai swords, and dozens of display knives and other guns hanging on the walls." *Id.* The agents also observed dogs in the house. *Id.* The defendant later moved to suppress statements he made in an interview conducted during the search. As part of its *Griffin* analysis, the Eighth Circuit determined that the defendant was not free to move about his home, but held that this restrained movement did not mean that the defendant was in custody. The court stated:

> Given the extensive arsenal of weapons

> discovered inside [the] house, we find the absence of . . . unrestrained freedom of movement . . . much less significant than we otherwise would. Upon entering the residence, **agents confronted immediate threats to their physical security** - dogs, rifles and shotguns, a loaded handgun, . . . [etc.] From an objective viewpoint, a reasonable person in [the defendant's] shoes should have realized **the agents escorted him not to restrict his movement, but to protect themselves and the integrity of the search.**

Id. at 502-03 (emphasis added).

This passage shows that *Axsom* does not apply here. First, unlike in *Axsom,* Boylan and Bisswurm were not confronted with any threats to their physical safety upon entering Czichray's house. Boylan testified that "early on" in the interview, the agents conducted a walk-through of the house, ostensibly to ensure that there were no immediate threats to their safety. *(See* 11/14/01 Tr. at 44.) The agents found no dangerous animals or weapons lying close at hand, as did the authorities in *Axsom,* so there was far less need for concern about agent safety than in that case. Second, unlike in *Axsom,* Boylan and Bisswurm had no reason to be concerned about the integrity of any "search" or the destruction of evidence. In *Axsom,* the authorities were executing a search warrant. The defendant had no power to stop the search, and the Eighth Circuit correctly held that the officers could restrict the defendant's movement to prevent interference with the warrant. Czichray's case is different. Here, there was no search warrant; the agents' presence was not based on a legal order but upon Czichray's permission. Unlike the defendant in *Axsom,* Czichray was not legally required to accept the agents' presence in his home. Therefore, even if Boylan and Bisswurm were concerned

that Czichray might do something to frustrate their investigation - such as telephoning others to say that the FBI was in his home - they did not have the same power to stop this as they would to prevent interference with a search warrant.

Of course, the Magistrate Judge concluded that the agents did not prevent Czichray from communicating with others, but merely "suggested" that doing so would impair the investigation. This argument does not square with the agents' actions or with their rationale for escorting Czichray around his home. Boylan and Bisswurm maintained that they repeatedly told Czichray that his participation was voluntary. Despite this professed concern for Czichray's voluntary participation, the record demonstrates that the agents were preoccupied with the idea that Czichray might surreptitiously make a telephone call to someone outside the home to say that the FBI was questioning him. As noted above, the agents conceded that they did not permit Czichray to enter parts of his home until they confirmed that the rooms contained no telephones.

The Magistrate Judge notes that the agents were legitimately concerned about Czichray "blowing" their investigation, but neither the government nor the Magistrate Judge provide authority for their proposition that the FBI had the power to preserve Czichray's "voluntary" cooperation by preventing his communication with people outside his home. The agents were free to admonish Czichray that telling others of their presence would spoil his cooperation, but Czichray was entitled to ignore such a request. His choice to do so may have made the agents' investigation harder, but the choice was for Czichray - not the agents - to make. If Czichray's cooperation was truly voluntary, there was no need to control his access to the telephone. If Czichray's cooperation was not coerced, he should have been free at any time to phone a friend or family member and tell them that he was being questioned by the FBI. The agents' zealous efforts to keep

Czichray away from telephones demonstrate that he had no such freedom. The restrictions imposed by Boylan and Bisswurm are inconsistent with voluntary cooperation.[11]

Based upon *a de novo* review of the testimony and the record, the Court concludes that the agents controlled Czichray's movements and freedom of communication during the interview on February 16, 2001. The Court finds that such control was not to preserve agent safety, but - despite the agents' testimony to the contrary - was to prevent Czichray from exercising his right not to cooperate with the investigation by notifying people of the FBI's presence in his home. If, as the agents contended, Czichray was truly free to decline to cooperate, the agents had no reason to restrict his access to telephones. This finding thus does not mitigate any finding of custody.

c. Who Initiated Contact

The Magistrate Judge correctly noted that "the Agents

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[11] The government argues that restricting Czichray's free access to the telephone does not create a coercive atmosphere, relying on *United States v. Helmel, 769* F.2d 1306 (8th Cir. 1985*). Helmel,* however, does not support the government's argument. In that case, the Eighth Circuit considered whether a defendant was in custody during an interrogation at his home. The court noted that during the interview, an FBI agent "answered all incoming telephone calls" while the interview progressed, but the court "fail[ed] to see how this created a coercive atmosphere." *Id.* at 1320. Czichray's case is markedly different. The restrictions upon Czichray on February 16, 2001 were not limited to **answering** the phone; he was not permitted free access to the phone at all. *Helmel* merely held that the agent's answering of the phone did not create a coercive atmosphere. The court did not reveal whether the defendant was permitted to make phone calls, or whether the FBI agent simply answered the phone and handed it to the defendant if the call was for him. *See id.* Significantly, in *Helmel* about half of the calls to the defendant's residence were for the FBI agent. *Id.* This Court finds the circumstances leading to a conclusion of no custody in *Helmel* were far more innocuous than the restrictions placed upon Czichray here. *Helmel* thus does not support the government's argument.

clearly initiated the contact with Czichray." (R&R at 62.) The Magistrate Judge is also correct that in evaluating this factor, the Court must consider its "disjunctive prong" - whether Czichray "voluntarily acquiesced" to requests by agents to answer questions. *See United States v. Wallace,* 323 F.3d 1109, 1112 (8th Cir. 2003); *Axsom,* 289 F.3d at 510. The Magistrate Judge concluded that Czichray acquiesced to the interview by letting the agents in his home, and by not asking the agents to leave.

Although it is clear that Czichray allowed the agents to enter his home and never asked them to leave, the Court does not share the Magistrate Judge's confidence that this behavior represents "voluntary acquiescence" under Eighth Circuit case law. Even the Magistrate Judge noted that in the one case he cites, *Axsom,* the defendant was far more obliging than Czichray was in this case. In *Axsom,* the defendant was "friendly and cooperative during the interview," and even telephoned following the interview to commend the FBI agents for their professionalism, stating that "I done something that was illegal." *Axsom,*. 289 F.3d at 502. Another example of voluntary acquiescence is found in *United States v. Galceran,* 301 F.3d 927 (8th Cir. 2002). In that case, the Eighth Circuit found that despite agent-initiated contact, the defendant voluntarily acquiesced by telephoning the officers to indicate he wanted to speak with them, then calling again three days later, and voluntarily driving to the police station to talk. *Id.* at 930. The defendant in *Galceran* also told his mother and his girlfriend that he was going to turn himself in, and during the interview indicated he was participating voluntarily, stating, "There's no threats or promises, just . . . a hope . . . that if I did this it would maybe give me leniency and mercy with the judge." *Id.* Yet another example is Evangelist, who, as discussed above, agreed to meet with the FBI on several occasions, suggesting meeting places and driving himself there. *See supra,* Part I.B.2.

The common thread in these instances of voluntary

acquiescence is an effort to assist in the investigation and an acknowledgement of responsibility that goes above and beyond a mere absence of resistance. The Magistrate Judge acknowledged that Czichray was not an "enthusiastic participant" in the interview, but found that he voluntarily acquiesced because he "made no attempt to terminate the interview directly or indirectly," and allowed the interview "to proceed to its closing." (R&R at 64.) Czichray certainly did not resist the agents' questioning, but in the Court's view this does not rise to the level of active cooperation that the Eighth Circuit has found to constitute "voluntary acquiescence" for the third *Griffin* factor. Thus, the Court concludes that the interview was initiated by the FBI agents, and that Czichray did not voluntarily acquiesce. This factor thus does not mitigate a finding of custody.

d. Tactics Used by the Agents

In *Czichray I,* this Court recognized that it is a close question whether or not Boylan and Bisswurm utilized "strong arm tactics or deceptive stratagems" in their interrogation of Czichray. The Court ultimately determined that they did, resting primarily on the agents' pressure and threats placed upon Czichray to cooperate. These threats were exemplified by the agents' statement that if Czichray did not cooperate, they would "light up his life." Czichray argues that this phrase meant that the FBI threatened to investigate his father and other aspects of his life. The Magistrate Judge determined that such a threat is permissible. This determination rested largely on the Magistrate Judge's prior conclusion that Czichray voluntarily acquiesced to the agents' questions, a finding this Court does not share. The Magistrate Judge also noted that it is permissible for agents to discuss the consequences of a suspect's failure to cooperate, namely, further and more detailed investigation.[12]

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[12] In support, the Magistrate Judge relies upon two Eighth Circuit cases, *United States v. Santos-Garcia,* 313 F.3d 1073 (8th Cir. 2002) and

This Court finds that the question of strong arm tactics remains a close one. The agents did not threaten Czichray with force or display any weapons, but in addition to the promise to "light up" Czichray's life, they suggested that if he did not cooperate, the FBI would pressure insurance companies to withhold payments from his business. As discussed above, the agents denied making such threats. Upon reviewing all the transcripts and considering Magistrate Judge Noel's credibility determination in *Czichray I*,[13] the Court finds Czichray's testimony on this point credible. Strong arm tactics need not be confined to threats of force, and the Court finds that the agents' threats to interfere with insurance payments went too far. *See Griffin*, 922 F.2d at 1351. Therefore, the Court finds that these threats do constitute strong arm tactics. Consequently, this is an aggravating factor - albeit a mild one - in favor of finding that Czichray was in custody.

e. Domination of the Interview

This Court decisively found in *Czichray I* that the interview was dominated by the FBI agents. The Magistrate Judge disagrees, resting principally upon his determination that Czichray's movement around his home was not substantially impaired. (*See* R&R at 70-71.) Upon *a de novo*

United States v. Astello, 241 F.3d 965 (8th Cir. 2001). The Magistrate Judge notes that *Santos-Garcia* was decided after *Czichray I*, implying that its result, based upon *Astello*, should control here. (*See* R&R at 65.) Neither of these cases controls, however, because here the Court must consider whether Czichray was in custody; in *Santos-Garcia* and *Astello*, the custody issue was undisputed, because both suspects were formally arrested and had received and waived their *Miranda* rights. *See Santos-Garcia*, 313 F.3d at 1076; *Astello*, 241 F.3d at 966. Rather than the question of custody, those cases focused on whether police tactics rendered the defendants' confessions involuntary.

[13] Magistrate Judge Noel was the only judge to hear first-hand testimony from Czichray, and he found Czichray credible on this point. (*See* Noel R&R at 5.)

review of the record, this Court concludes that its finding in *Czichray I* was correct, and that the interview was police dominated. The Magistrate Judge noted that Czichray's movement was relatively unrestricted, that he was outnumbered only two-to-one by the agents, and that he "answered his door, prior to knowing that his early morning callers were FBI agents, and he wore only his boxers and t-shirt." *(Id.* at 70.) The Magistrate Judge also found that the fact the interview took place in the "relative comfort of [Czichray's] living room" militated against a finding of police domination. (*Id.*)

The Court has already found that Czichray's movement was unduly restricted, thus undermining this foundation of the Magistrate Judge's conclusion. Furthermore, the Court cannot agree that interrogation in a suspect's home precludes a finding of custody. The Eighth Circuit has held that "[w]hen a suspect is interrogated in the comfort and familiarity of his home, a court is less likely to find the circumstances custodial." *Axsom,* 289 F.3d at 502. However, the Eighth Circuit has also recognized that "a suspect's sense of captivity can actually be intensified by the intrusive and intimidating environment created when agents of the law take control of a person's private residence." *Griffin,* 922 F.2d at 1355 n.15. As established above, Boylan and Bisswurm severely restricted Czichray's freedom within his own home, controlling his movements and preventing him from communicating with anyone outside the house. As the Court noted in *Czichray I,* this situation bears a strong resemblance to the type of "incommunicado, police dominated atmosphere" about which the *Miranda* court was so "deeply concerned." *Id.* at 1352. Boylan and Bisswurm arrived at Czichray's house, stating that they would be staying only a short period of time. Once Czichray permitted them to enter, they effectively seized control of Czichray's home, controlling what telephone calls could come in and out, and controlling Czichray's freedom of movement. "[A]

person can not reasonably expect to be free anywhere if not within the refuge of his home," and the Court finds that Boylan and Bisswurm deprived Czichray of freedom within his own home. *Id.* at 1355 n.15. The Court therefore determines that the interview was agent-dominated, and thus aggravates the circumstances in favor of finding that Czichray was in custody.

f. Arrest

It is undisputed that Czichray was not placed under arrest at the conclusion of the interview. This factor thus does not aggravate the circumstances.

g. Totality of the Circumstances

The ultimate task of determining custody is a "slippery one." *Axsom,* 289 F.3d at 500. Nevertheless, upon a *de novo* review of the complete record, the Court finds that Czichray was in custody during the interview. The Court reaches this conclusion recognizing that the six *Griffin* factors are not exclusive, nor must each factor point in favor of custody. *Id.* at 501. The Court finds that Boylan and Bisswurm's heavy-handed domination of Czichray's movements and their preventing him from communicating with others undermined Czichray's consent to enter his home, and negated any promises - no matter how numerous - that the interview would be purely voluntary. *See id.* ("[A] particularly strong showing of one *[Griffin]* factor may compensate for a lesser or non-existent showing of another factor.") The Court concludes that under the totality of circumstances, a reasonable person in Czichray's position would not have believed that he was free to terminate the interview and ask the agents to leave. Czichray was in custody on February 16, 2001, and should have received the *Miranda* warnings. Because he was in custody without having been apprised of his *Miranda* rights, no waiver of those rights - such as that ostensibly found in the written

statement - is valid because it was not knowing and intelligent. *See Miranda,* 384 U.S. at 444; *United States v. Syslo,* 303 F.3d 860, 865 (8th Cir. 2002) ("A waiver is knowing if it is `made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'") (citation omitted). Therefore, the illegally-obtained written statement must be suppressed.

III. Czichray's and Pindyck's Motion to Suppress Statements to State Farm

A. Factual Background - Investigation by State Farm

State Farm Insurance Company ("State Farm") was also investigating claims submitted by defendants on behalf of its customers. On June 21, 2000, Czichray and Pindyck were interviewed by Dale Krueger ("Krueger") and Michael Bernhagen ("Bernhagen"), who were conducting this investigation for State Farm.

Krueger testified that he did not recall whether he had met with anyone from the government, including FBI Agent Thompson, prior to June 21, 2000. He did testify that one of his co-workers, Nancy Stalogh ("Stalogh"), had met with Thompson in 1999, but that he did not know about these meetings prior to the June 21, 2000 interview with Czichray and Pindyck. Thompson testified that he thought Krueger was present at a November 16, 1999 meeting with Stalogh, though the Magistrate Judge found that "Thompson was most likely mistaken in this recollection." (R&R at 21.) Krueger testified that he did not remember whether he met with Stalogh regarding the defendants on or before November 16, 1999. Krueger also testified that he did not interview Pindyck and Czichray at the behest of any law enforcement agents or the government, and that no government agents were present at the interview.

As part of his investigation, Krueger visited the defendants' clinics on several occasions, each time preparing reports that included diagrams of the clinics' layouts. Krueger

later gave these diagrams to the FBI, and the agency used them in applications for search warrants for the clinics. Krueger testified that he did not prepare these documents at the FBI's direction, and only turned them over to the FBI after the agency formally requested them pursuant to Minnesota law.

While visiting the clinics, Krueger would sometimes inspect patient files. On one visit, apparently at Stalogh's request, he picked up the files for a Muhammad Noor ("Noor"). According to FBI Agent Bisswurm, Noor was an FBI informant who the FBI believed was involved in insurance fraud. Bisswurm testified that as part of its investigation of Noor, the FBI asked State Farm for documents on Noor, but never asked State Farm to investigate Noor.

B. Analysis

Czichray and Pindyck argue that the statements they made to Kreuger and Bernhagen on June 21, 2000 must be suppressed because, unbeknownst to the defendants, the State Farm employees were acting as agents of the government and assisting in its criminal investigation.

It is well established that "the constraints of the Fourth and Fifth Amendments do not apply to purely private activity." *United States v. Garlock,* 19 F.3d 441, 442 (1994). *See United States v. Papajohn, 212* F.3d 1112, 1122 (8th Cir. 2000). However, these amendments do protect against activities conducted by private parties acting "as an instrument or agent of the Government." *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 614 (1989). To show that the State Farm employees were acting as government agents, the defendants must show that "the government exercised such coercive power or such significant encouragement that it is responsible for [State Farm's] conduct, or that the exercised powers are the exclusive prerogative of the government." *Garlock,* 19 F.3d at 443

(citation and quotation marks omitted). The Magistrate Judge determined that the State Farm investigators were not acting as government agents when Pindyck and Czichray made their statements, and that the statements therefore need not be suppressed. Pindyck, in a brief joined by Czichray, objects.

Pindyck contends that Krueger[14] was "in cahoots" with the FBI, particularly Thompson, beginning in January 2000. (Pindyck Obj. at 8.) The crux of Pindyck's argument is that "Thompson and Krueger covered up their relationship in order to conceal the fact that Krueger took the June 21, [2000] statement at the behest of the FBI." (Pindyck Obj. at 3.) The Court finds that Pindyck presents no evidence to support this allegation.

Pindyck first attempts to undermine Krueger's credibility by noting differences between his and Thompson's testimony. After noting that there may be a discrepancy over whether Krueger was at a November 1999 meeting with Thompson, Pindyck concedes that whether Krueger attended the meeting "is probably not important," and that Krueger probably was not actually at the meeting. *(Id.* at 4.) Pindyck then notes that the two men had different recollections about when they first met. Thompson testified that he "first came in contact" with Krueger in 1997 or 1998, (11/22/02 Tr. at 95), while Krueger testified. that he did "not remember" having "any meetings" with Thompson prior to June 21, 2000. (11/22/02 Tr. at 108). These statements do not contradict each other as starkly as Pindyck portrays. Moreover, Pindyck uses this highly equivocal contradiction as evidence of some secret dealings by Krueger and Thompson. Pindyck offers no evidence of any dealings between the two men prior to June 21, 2000, but he states, in circular fashion: "What reason could [Krueger] have for denying a prior professional

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[14] Although both Krueger and Bernhagen questioned the defendants, Krueger was the principal investigator and the Court will therefore refer only to him. The Court's findings, however, apply equally to both Krueger and Bernhagen. (*See* R&R at 73 n.40.)

relationship with Thompson other than to conceal their relationship as of June 21, 2000?" *(Id.* at 5.) This is speculation, not evidence. Pindyck also notes other apparent incongruities in Krueger's testimony, but does not explain what this proves, other than to state that "the only logical conclusion is that [Krueger] was deliberately trying to conceal his role in the government's investigation." (Id.) Again, this is nothing more than bare conjecture.

Pindyck next presents evidence that Krueger and Thompson interacted after Krueger interviewed the defendants on June 21, 2000. Pindyck claims that Thompson improperly told State Farm about grand jury proceedings, and then testified to the contrary. Pindyck then alleges several instances in which Thompson and Krueger interacted after June 21, 2000. Pindyck claims that this information undermines Krueger's and Thompson's contention that Krueger acted independently. Even if Pindyck's allegations are to be believed, however, this provides no evidence that Thompson and Kreuger concealed the "nature of their relationship" prior to June 21, 2000.

Finally, Pindyck contends that the FBI's use of Krueger's diagrams, and the fact that Krueger picked up the file of Muhammad Noor for Stalogh demonstrates that Krueger was working for the government. These allegations also are unsupported. As the Magistrate Judge stated, the "mere fact that Krueger shared information with the FBI does not establish that he acted as a government agent, as investigators for insurance companies routinely provide law enforcement with information they uncovered in the course of their private investigations." (R&R at 76.) Indeed, Krueger testified that he provided information to the FBI only because the FBI asked for it, and that Minnesota law required State Farm to provide evidence of fraud to law enforcement. Pindyck also presents no evidence that Krueger's obtaining Noor's patient file was in any way directed or controlled by the government.

In sum, the Court finds that Pindyck's objections contain many accusations and considerable speculation, but they present absolutely no evidence that Krueger or any State Farm representative acted as an agent of the government when Pindyck and Czichray made their statements to State Farm. Therefore, the Court will deny the defendants' motion to suppress those statements.

IV. FBI Search of Clinics - Defendants' Motions to Suppress Evidence

Defendants Bruno and Pindyck filed motions to suppress evidence seized from various chiropractic clinics.[15] The Magistrate Judge did not consider the merits of these motions, because he determined that none of the defendants have standing[16] to challenge the legality of the search warrants. Bruno and Pindyck now object to this conclusion.

Fourth Amendment rights are personal and cannot be asserted vicariously. *United States v. Pierson,* 219 F.3d 803, 806 (8th Cir. 2000). Thus, a defendant "can argue for the suppression of evidence gathered in violation of the Fourth Amendment `only if that defendant demonstrates that **his** Fourth Amendment rights were violated by the challenged search or seizure.'" *United States v. Payne,* 119 F.3d 641, 641 (8th Cir. 1997) (quoting *United States v. Padilla,* 508 U.S. 77, 81 (1993)) (emphasis original). If a defendant does not prove a sufficiently close connection to the relevant places or objects searched, he has no standing to claim that they were searched or seized illegally. *United States v. Gomez,* 16 F.3d

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[15] Evangelist and Czichray also filed motions to suppress, but they do not object to the Magistrate Judge's recommendation that those motions be denied.

[16] As the Magistrate Judge recognized, there is Technically no doctrine of "standing" in Fourth Amendment law. However, courts in the Eighth Circuit use the term "standing" as a shorthand reference to the issue of whether a defendant's Fourth Amendment interests are implicated. *See United States v. Green,* 275 F.3d 698 n. 3 (8th Cir. 2001).

254, 256 (8th Cir. 1994). Each defendant in this case has the burden to show that he had a legitimate expectation of privacy that was violated by the challenged search. *Pierson,* 219 F.3d at 806; *Payne,* 119 F.3d at 641. To establish such a legitimate expectation, each defendant must demonstrate: (1) a subjective expectation of privacy; and (2) that the subjective expectation is objectively reasonable. *United States v. Muhammad,* 58 F.3d 353, 355 (8th Cir. 1995); *United States v. Welliver,* 976 F.2d 1148, 1151 (8th Cir. 1992). Factors relevant to determining standing include:

> ownership, possession and/or control of the area searched or item seized; historical use of the property or item; ability to regulate access; the totality of the circumstances surrounding the search; the existence or nonexistence of a subjective anticipation of privacy; and the objective reasonableness of the expectation of privacy considering the specific facts of the case.

Gomez, 16 F.3d at 256.

A. Bruno's Motion to Suppress

1. Standing

The Magistrate Judge found that Bruno did not have a legitimate expectation of privacy in any of the three properties at issue: Ocean Management, Northeast Spinal, and St. Paul Spinal. The Magistrate Judge found that Bruno had no standing to challenge the search of Ocean Management because the record is "devoid" of evidence that Bruno had any affiliation with that clinic. (R&R at 82.) Bruno does not object to this finding. He does object, however, to the Magistrate Judge's finding that he had no standing vis-a-vis Northeast Spinal and St. Paul Spinal because, despite his ownership interest in the clinics, he "did not have exclusive control of either clinic, of any areas of

either clinic, or of any documents seized therein." (R&R at 85.)

Bruno claims that the Magistrate Judge erred by failing to consider United States Supreme Court doctrine that the Fourth Amendment protects commercial premises. Bruno argues that he had a reasonable expectation of privacy in the two clinics because he had an ownership interest in them and because he "practiced his trade there." (Bruno Obj. at 2.) Bruno is correct that courts recognize a privacy interest in business premises, but the Magistrate Judge did not ignore this. *(See* R&R at 80.) Bruno is also wrong in stating that ownership alone establishes a reasonable expectation of privacy. It does not. *See United States v. Najarian,* 915 F. Supp. 1441, 1450 n.5 (D. Minn. 1995). Rather, ownership is only one of many factors to be considered when evaluating whether someone has a legitimate expectation of privacy. *See Gomez,* 16 F.3d at 256.

The Court also finds that Bruno's statement that he "practiced his trade" at the two clinics is not sufficient to establish a legitimate expectation of privacy there. Bruno does not challenge the Magistrate Judge's findings that he had "very little, if any" degree of exclusivity and control over either clinic, that all areas of the clinics were used by other people, and that "Bruno spent limited time at the clinics." (R&R at 83.) The "less private a work areas - and the less control a defendant has over that work area - the less likely standing is to be found." *Najarian,* 915 F. Supp. at 1452 (quoting *United States v. Hamdam,* 891 F. Supp. 88, 94-95 (E.D.N.Y. 1995)). Thus, based on the uncontested facts as found by the Magistrate Judge, the Court finds that Bruno did not have a subjective or legitimate expectation of privacy in Northeast Spinal or St. Paul Spinal. Because he also had no legitimate expectation of privacy in Ocean Management, the Court finds that Bruno does not have standing to challenge the search warrants at issue here. Accordingly, the Court must deny Bruno's motion to suppress.

2. Bruno's Request for a *Franks* Hearing

Bruno also objects to the Magistrate Judge's denial of his request for a hearing pursuant to *Franks v. Delaware,* 438 U.S. 154 (1978). Bruno argues that a hearing must be held to determine the veracity of Thompson's search warrant affidavit, claiming that Thompson omitted material facts and thus undermined probable cause for the warrant. Because the Court has already determined that Bruno does not have standing to challenge the search warrant, the Court may not consider his request for a *Franks* hearing. Even if Bruno did have such standing, however, the Court would still deny his request.

To obtain a *Franks* hearing, Bruno must make two showings: (1) a "substantial preliminary showing" that the affidavit contained a false or reckless statement or omission; and (2) that the alleged false statement or omission was necessary to the finding of probable cause. *United States v. Gabrio,* 295 F.3d 880, 883 (8th Cir. 2002); *United States v. Mathison,* 157 F.3d 541, 547-48 (8th Cir. 1998). This burden "is not easily met." *Gabrio,* 295 F.3d at 883. "A mere allegation standing alone, without an offer of proof in the form of a sworn affidavit of a witness or some other reliable corroboration, is insufficient to make the difficult preliminary showing." *Mathison,* 157 F.3d at 548. Here, Bruno offers several allegations of intentional omissions, but he provides no evidence or corroboration. Because Bruno offers nothing more than allegations in support of his request for a *Franks* hearing, the Court must deny the request.

3. Overbreadth

Bruno next contends that the search warrant was unconstitutionally overbroad, and amounts to a "general warrant," which was "limited only by the imagination and discretion of the executing agents." (Bruno Obj. at 2.) The Court disagrees.

The Fourth Amendment requires that a search warrant

describe with "sufficient particularity" the items to be seized. *United States v. Kail,* 804 F.2d 441, 445 (8th Cir. 1986). The degree of specificity required of a warrant is flexible, and depends on the circumstances of the case and the type of items involved. *Id.; United States v. Horn,* 187 F.3d 781, 788 (8th Cir. 1999). The Eighth Circuit has held that when a warrant is used to investigate a scheme to defraud, it is sufficiently particular "if it is as specific as the circumstances and nature of activity under investigation permit." *Kail,* 804 F.2d at 445 (citation omitted). Accordingly, a "warrant naming only a generic class of items may suffice if the individual goods to be seized cannot be more precisely identified at the time that the warrant is issued." *Horn,* 187 F.3d at 788. *See United States v. Dennis,* 625 F.2d 782, 792 (8th Cir. 1980).

In *Kail,* the Eighth Circuit considered a warrant that authorized the seizure of, among other things, "accounting ledgers or records, checkbooks, monthly statements, cancelled checks, and deposit slips ... inventory records, records of safety deposit boxes, ... customer files, client lists, letters and mailings from clients, checks, cash, coins or bullion shipments sent as payment for purchases and advertising materials." *Kail,* 804 F.2d at 444-45. The court held that "it would not be possible through a more particular description to separate those business records that would be evidence of fraud from those that would not since there was probable cause to believe that fraud permeated the entire business operation." *Id.* at 445. The Court finds that the same reasoning applies to the fraud investigation in this case. Given the nature and circumstances of this case, the Court concludes that the warrants were as particular as possible and were not constitutionally overbroad.

Even if the warrants were overbroad, however, the Court would not suppress the evidence because the searches were conducted in good faith. *See United States v. Leon,* 468 U.S. 897 (1984) (holding that evidence should not be

suppressed where officers rely in reasonable good faith on a properly obtained warrant that proves to be invalid); *United States v. Stelten,* 867 F.2d 446, 451 (8th Cir. 1989). Bruno contends that this "good faith exception" should not apply because the warrants were facially invalid. He argues that to "justify a search under the good faith doctrine, the warrants must first be facially valid - including compliance with the constitutional requirement of particularity." (Bruno Obj. at 4.) This argument is wrong, and contradicts Eighth Circuit law. The Eighth Circuit has explicitly held that the good faith exception "is not automatically inapplicable in every case where a warrant is found invalid on the ground that it is insufficiently particular." *United States v. Curry,* 911 F.2d 72, 77 (8th Cir. 1990). *See United States v. Thomas,* 263 F.3d 805, 809 (8th Cir. 2001). Of course, none of the defendants have demonstrated that the warrants in this case are facially invalid. Even if they were, however, this would not necessarily be sufficient to bar application of the good faith exception. Here, as the Magistrate Judge noted, the search warrants were approved by a neutral and experienced Magistrate Judge, and that there was no evidence of bad faith by the agents who secured and executed the warrants. The Court therefore concludes that even if the warrants were lacking in particularity, the evidence should not be suppressed because the searches were conducted in good faith reliance on the warrants.

B. Pindyck's Motion to Suppress

Pindyck's objection to the Magistrate Judge's recommendation on this motion is limited to the statement that he "objects to . . . [t]he recommendation that Defendant Pindyck's Motion to Suppress Physical Evidence be denied ...." (Pindyck Obj. at 1.) Pindyck provides no further discussion of this objection, nor does he explain the basis of his objections. He does state that he "relies on the memoranda and arguments below to support his objection. This violates

the Court's local rules, which require that a party objecting to a Report and Recommendation provide the basis for, such objection. *See* D. Minn. LR 72.1(c)(2). Such a general reference to previous argument also gives insufficient information for the Court to determine the basis for Pindyck's present objection. Therefore, the Court must overrule the objection and deny his motion to suppress physical evidence.

V. Czichray's and Pindyck's Motions to Dismiss the Superceding Indictment

Bruno, Pindyck, and Czichray all moved to dismiss the indictment, arguing that it was obtained through the use of tainted evidence. The Magistrate Judge recommended that the motions be denied, based upon his determination that no evidence need be suppressed. Pindyck and Czichray object to this recommendation.[17] Czichray specifically argues that the indictment must be dismissed if it was obtained using his February 16, 2001 written statement. Czichray argues that because this statement must be suppressed, it could not be used to secure an indictment.

As noted above, this Court has ruled that Czichray's statements to agents on February 16, 2001 must be suppressed. However, the government notes that these statements were never presented to the grand jury when it was considering whether to indict the defendants. Moreover, it is settled law that a grand jury may consider illegally obtained evidence. *United States v. Calandra,* 414 U.S. 338, 354-55 (1974). Therefore, defendants' arguments in this regard are without merit, and their motion to dismiss the indictment will be denied.

VI. Appeals of Magistrate Judge's Orders

Included with the Magistrate Judge's Report and

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[17] As with the motion to suppress, Pindyck's objection here is limited to one sentence. (*See* Pindyck Obj. at 1.) Although Czichray's objections are not much longer, they do provide a basis.

Recommendation were several orders on non-dispositive matters. Czichray and Pindyck now appeal some of those orders. An order of a magistrate judge on non-dispositive pretrial matters may be reversed only if it is clearly erroneous or contrary to law. *See* 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); D. Minn. LR 72.1(b)(2). The Court discusses each defendant's appeals in turn.

A. Czichray

The Magistrate Judge granted the motions by Czichray, Pindyck, and Bruno for disclosure of evidence favorable to the defendants pursuant to *United States v. Brady,* 373 U.S. 83 (1963) and *United States v. Giglio,* 405 U.S. 150 (1972). *(See* R&R at 2 n.3.) The Magistrate Judge noted that the government stated that the requested information had already been, or would be produced to the defendants. Czichray has now filed an objection which argues, essentially, that he does not believe that the government will comply with the Magistrate Judge's order. As the Magistrate Judge recognized, the Court is not positioned to prospectively determine what information in the government's possession qualifies as *Brady* material. However, defendants have made a motion, and it has been granted; the government is therefore obligated to produce all *Brady* evidence. If Czichray or another defendant suspects that the government is not complying with the Magistrate Judge's order, he may bring that to the Court's attention. As matters now stand, however, the Court finds nothing to which Czichray may properly object. Therefore, to the extent that Czichray appeals the Magistrate Judge's Order granting his motion to produce *Brady* evidence, that appeal is denied.

B. Pindyck

Pindyck appeals the Magistrate Judge's orders: (1) granting his Motion for Early Disclosure of Jencks Act Material; (2) denying his Motion for Disclosure of Government Witnesses; (3) denying his Motion to Confirm or

Deny the Unlawful Employment of Electronic Surveillance; and (4) denying his Motion for Severance.

The Magistrate Judge granted Pindyck's Motion for Early Disclosure of Jencks Act Material to the extent that the government must disclose such material no later than three days before trial. *(See* R&R at 3 n.7.) Pindyck requests that such material be disclosed thirty days before trial, arguing that a period of three days would result in "certain delays of the trial once the jury is impaneled and testimony has begun." (Pindyck Obj. at 2.) These arguments do not compel reversing the Magistrate Judge's order. "The Jencks Act does not compel the government to produce a statement or report of a government witness until after the witness has testified on direct examination...." *United States v. Green,* 151 F.3d 1111, 1115 (8th Cir. 1998*)*. The Magistrate Judge's ruling is thus perfectly consistent with Eighth Circuit law. Accordingly, the Court denies Pindyck's appeal of this order.

The remainder of Pindyck's appeals are one-sentence statements of the orders that he is appealing. The Magistrate Judge explained the legal basis for his rulings on these motions. *(See* R&R at 2 n.4, 3 n.6, 4 n.9.) Pindyck, however, has done no more than reference his earlier arguments to the Magistrate Judge. The Magistrate Judge obviously considered these arguments in formulating his ruling; Pindyck does not explain why he believes these rulings are clearly erroneous or contrary to law. In the absence of any such showing, the Court denies Pindyck's appeals on these three orders.

ORDER

Based on the foregoing, all the records, files, and proceedings herein, the Court **ADOPTS IN PART AND REJECTS IN PART** the Magistrate Judge's Report and Recommendation [Docket Nos. 112-115]. Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant Pindyck's Motion to Suppress Statements [Docket No. 28] is **DENIED**.

2. Defendant Bruno's Motion to Suppress Statements [Docket No. 52] is **DENIED**.

3. Defendant Czichray's Motion to Suppress Confessions or Statements in the Nature of Confessions [Docket No. 65] is **GRANTED**.

4. Defendant Evangelist's Motion to Suppress Statements [Docket No. 77] is **DENIED.**

5. Defendant Pindyck's Motion to Suppress Physical Evidence [Docket No.29] is **DENIED**.

6. Defendant Bruno's Motion to Suppress Physical Evidence [Docket No. 52] is **DENIED**.

7. Defendant Czichray's Motion to Suppress Evidence Obtained by Search [Docket No. 66] is **DENIED**.

8. Defendant Evangelist's Motion to Suppress Evidence Procured as a Result of Illegal Arrest [Docket No. 78] is **DENIED**.

9. Defendant Pindyck's Motion to Dismiss the Indictment [Docket No. 37] is **DENIED.**

10. Defendant Bruno's Motion to Dismiss the Indictment [Docket No. 59] is **DENIED.**

11. Defendant Czichray's Motion to Dismiss the Indictment [Docket No. 67] is **DENIED.**

IT IS FURTHER ORDERED THAT:

12. Defendant Czichray's appeal [Docket No. 119] of the Magistrate Judge's Order granting the Motion for Disclosure of *Brady* Evidence [Docket No. 111] is

DENIED.

13. Defendant Pindyck's appeal [Docket No. 122] of the Magistrate Judge's Order on his Motions for Disclosure of Government Witnesses; to Confirm or Deny the Unlawful Employment of Electronic Surveillance; for Early Disclosure of Jencks Act Material; and for Severance [Docket No. 111] is **DENIED**.

DATED: August 22, 2003at
at Minneapolis, Minnesota.

s/_____
JOHN R. TUNHEIM
United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-3336

United States of America, *
Appellant, *
* Appeal from the
* United States
v. * District Court for the
* District of Minnesota
Michael S. Czichray, *
Appellee. *

Submitted: March 8, 2004
Filed: August 11, 2004

Before WOLLMAN, MORRIS SHEPPARD ARNOLD, and COLLOTON, Circuit Judges.

COLLOTON, Circuit Judge.

The government appeals from an order of the district court suppressing a written statement that Dr. Michael Czichray, a chiropractor, signed at the conclusion of an interview with FBI agents. The district court determined that the statement should be suppressed because it was the product of custodial interrogation that was conducted without informing Czichray of his *Miranda* rights. *See Miranda v. Arizona,* 384 U.S. 436 (1966). We respectfully disagree, and we reverse.

I.

The district court, after receiving a report and recommendation from a magistrate judge, made extensive findings of fact concerning Czichray's encounter with the FBI, and the government does not assert on appeal that any of

these findings were clearly erroneous. FBI agents Timothy Bisswurm and Sean Boylan went to Czichray's home the morning of February 16, 2001, to interview him regarding a health care fraud investigation. Prior to their arrival, the agents called Czichray at 4:30 a.m. to ensure that Czichray was home, stating they had the wrong number. At 6:30 a.m., the agents approached the home. When Czichray did not answer the door, Agent Boylan called Czichray by telephone and told him that he needed to come to the front door. When Czichray appeared, Boylan identified himself and Bisswurm as FBI agents and told Czichray they would like to speak with him for a few minutes. Boylan further informed Czichray that he need not speak with the agents. Although he was dressed in a t-shirt and boxer shorts, Czichray admitted the agents into his home, and the three men proceeded to the living room to discuss the investigation.

Over the course of the ensuing interview, which lasted nearly seven hours, Czichray was informed several times that his participation was voluntary, and that he was free to ask the agents to leave his home. About three hours into the interview, Czichray told the agents that he was late for work. The agents instructed Czichray to call in sick, and directed him not to inform his office about the investigation. Czichray complied. Although the telephone rang several times as the interview progressed, the agents instructed Czichray not to answer, and Czichray did not do so. When Czichray moved about his home on two occasions to go to the bathroom and his bedroom, Boylan accompanied him to check the rooms for telephones. During the interview, Czichray was told that if he did not cooperate, the agents would interview his 75-year-old father and others. The agents further told Czichray that they would "light up his world," and also suggested that if he did not cooperate, then they could use the power of the FBI to pressure insurance companies to withhold payments from his business.

Czichray did not resist the agents' questioning during the interview, and he never asked them to leave. At the conclusion of the meeting, Czichray signed a written statement (after making one correction and initialing each page) acknowledging that "no one has threatened, coerced or promised me anything." The written statement contained admissions that Czichray had knowingly caused insurance companies to reimburse at least one hundred false claims, and knowingly paid illegal fees to persons who referred new patients to Czichray's chiropractic clinic. There was no threat of arrest during the encounter, and the agents never displayed weapons. Czichray was not arrested until weeks later.

Czichray was charged in a twenty-seven count indictment with various crimes relating to an alleged health care billing fraud scheme. He brought a motion to suppress his signed statement. After concluding that Czichray was in custody and had not been given *Miranda* warnings, the district court granted the motion. In reviewing the district court's grant of Czichray's motion to suppress, we review its conclusions of law *de novo,* and its findings of fact for clear error. *United States v. Guevara-Martinez,* 262 F.3d 751, 753 (8th Cir. 2001).

II.

The ultimate question in determining whether a person is in "custody" for purposes of *Miranda* is "whether there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125 (1983) (internal quotation omitted). The "only relevant inquiry" in considering that question is how a reasonable person in Czichray's position would have understood his situation. *Berkemer v. McCarty,* 468 U.S. 420, 442 (1984); *see generally Yarborough v.*

Alvarado, 124 S. Ct. 2140, 2147-50 (2004). In making that evaluation, we consider the totality of the circumstances that confronted the defendant at the time of questioning. *United States v. Axsom,* 289 F.3d 496, 500 (8th Cir. 2002).

We have observed that "[t]he most obvious and effective means of demonstrating that a suspect has not been taken into custody ... is for the police to inform the suspect that an arrest is not being made and that the suspect may terminate the interview at will." *United States v. Griffin,* 922 F.2d 1343, 1349 (8th Cir. 1990) (internal quotation omitted). The FBI agents who interviewed Czichray exercised this "obvious and effective" means of demonstration in spades. Boylan and Bisswurm testified that they informed Czichray at least eight times that his participation in the interview was voluntary, and that he was free to ask the agents to leave his home. The magistrate judge recommended that "[g]iven this evidence, which is not controverted," the district court should find that Czichray was advised of his freedom to terminate the interview at will. (Add. 114). The district court ultimately found that "[a]s the Magistrate Judge noted, it is clear from the record that the agents informed Czichray several times that he could refuse to speak with them, and that he could tell them to leave." (Add. 23).

We believe that this abundant advice of freedom to terminate the encounter should not be treated merely as one equal factor in a multi-factor balancing test designed to discern whether a reasonable person would have understood himself to be in custody. That a person is told repeatedly that he is free to terminate an interview is powerful evidence that a reasonable person would have understood that he was free to terminate the interview. So powerful, indeed, that no governing precedent of the Supreme Court or this court, or any case from another court of appeals that can be located (save one decision of the Ninth Circuit decided under an

outmoded standard of review, *United States v. Lee,* 699 F.2d 466, 467-68 (9th Cir. 1982) (per curiam)), holds that a person was in custody after being clearly advised of his freedom to leave or terminate questioning.

The weighty inference that Czichray was not in custody after receiving such advice is strengthened further by the context in which the interview occurred -- the living room of Czichray's home. When a person is questioned "on his own turf," *United States v. Rorex,* 737 F.2d 753, 756 (8th Cir. 1984), we have observed repeatedly that the surroundings are "not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation." *United States v. Helmel,* 769 F.2d 1306, 1320 (8th Cir. 1985); *see also United States v. Wolk,* 337 F.3d 997, 1007 (8th Cir. 2003); *Axsom,* 289 F.3d at 502; *United States v. Sutera,* 933 F.2d 641, 647 (8th Cir. 1991). Even our court's one brief suggestion to the contrary, *see Griffin,* 922 F.2d at 1355 n.15, also cited *Miranda* itself for the "accepted logic" that "an interrogation in familiar surroundings such as one's home softens the hard aspects of police interrogation and moderates a suspect's sense of being held in custody."

In the Supreme Court's only decision involving whether *Miranda* applied to questioning of a suspect in a private home absent formal arrest, the Court concluded that the suspect "hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding." *Beckwith v. United States,* 425 U.S. 341, 347 (1976). Elaborating on the "custodial surroundings" described in *Miranda,* the *Beckwith* Court explained that "the principal psychological factor" of concern was *"isolating the suspect in unfamiliar surroundings* 'for no purpose other than to subjugate the individual to the will of his examiner.' 425 U.S. at 346 & n.7 (emphasis added) (quoting *Miranda,* 384 U.S. at 457). The teaching of *Beckwith,* which involved a

three-hour interrogation by two IRS agents in the dining room of a residence, was that such "noncustodial interrogation" might possibly in some situations lead to an involuntary confession inadmissible under the Fifth Amendment, *id.* at 347-48, but that the prophylactic rule of *Miranda* was not applicable.

In reaching its conclusion that Czichray was nonetheless in custody, the district court relied on the presence of certain "coercive factors" identified in *United States v. Griffin,* 922 F.2d at 1349, which were said in *Griffin* to "aggravate the existence of custody." *Id.* In *Griffin,* while emphasizing that our list of considerations was "merely intended to be representative of those indicia of custody most frequently cited by this and other courts when undergoing the prescribed totality of the circumstances analysis," *id.,* we identified six factors for consideration in making the custody determination: (1) whether the suspect was informed during the interview that the questioning was voluntary, that he could ask the officers to leave, or that he was not considered under arrest; (2) "whether the suspect possessed unrestrained freedom of movement during questioning;" (3) whether the suspect voluntarily acquiesced to official questioning or initiated contact with authorities; (4) "whether strong arm tactics or deceptive stratagems were employed during questioning;" (5) whether there was a police-dominated atmosphere; and (6) "whether the suspect was placed under arrest at the termination of the questioning." *Id.* We observed that the first three factors tended to mitigate the existence of custody, while the last three tended to aggravate it. *Id.* Both parties debate the presence and significance of these so-called " *Griffin* factors" in their briefs on appeal.

Although the "non-exhaustive" *Griffin* factors and their attendant balancing test are often cited in our decisions

concerning *Miranda,* we recently resolved the question of "custody" as an *en banc* court with nary a mention of *Griffin. See United States v. LeBrun,* 363 F.3d 715, 719-24 (8th Cir. 2004) (en bans). There is no requirement, therefore, that the *Griffin* analysis be followed ritualistically in every *Miranda* case. When the factors are invoked, it is important to recall that they are not by any means exclusive, and that "custody" cannot be resolved merely by counting up the number of factors on each side of the balance and rendering a decision accordingly. Exploring the nuances of such vague factors as "voluntary acquiescence," "strong arm tactics," and "police-dominated atmosphere" in order to place them on one side or the other of a balancing scale may tend to lose sight of the forest for the trees. The ultimate inquiry must always be whether the defendant was restrained as though he were under formal arrest. And the court must consider whether the *historical facts,* as opposed to the one-step-removed *Griffin* factors establish custody. The debatable marginal presence of certain judicially-created factors that ostensibly tend to "aggravate the existence of custody" cannot create the functional equivalent of formal arrest where the most important circumstances show its absence.

The district court relied heavily on its finding that the FBI agents instructed Czichray not to alert others by telephone of the FBI's presence during the interview, and escorted Czichray to his bedroom and bathroom to check for telephones before Czichray entered the rooms. There are two difficulties with this emphasis on telephones. The first is precedent. In *United States v. Sutera,* officers conducted a three and one-half hour search of Sutera's apartment, and then interviewed him for one hour. They "prevented him from using his phone" during the search, and then questioned him "in isolation" in his apartment. 933 F.2d at 647. In response to Sutera's contention that prohibition on use of the telephone was one of several factors that demonstrated custody, we

found the record *"devoid of any evidence* showing conduct by the officers which would lead to the conclusion that Sutera was in custody." *Id.* (emphasis added). Similarly, in *United States v. Helmel,* an FBI agent "answered all incoming telephone calls while the search and interview progressed," but we "fail[ed] to see how this created a coercive atmosphere." 769 F.2d at 1320.

The second difficulty presumably explains the precedent: That a suspect is discouraged from using a telephone in his home during an interview often is not probative of whether he is free to terminate the interview altogether. In this case, the FBI agents testified that they requested (or, as the district court found, "directed") Czichray not to use the telephone to disclose the presence of FBI agents, because such disclosure would interfere with Czichray's ability to cooperate with an ongoing investigation. If his cooperation with the FBI were known by alleged co-conspirators, then he could not assist the government (and potentially himself) through undercover telephone calls or recorded meetings with other suspects. This likely is a common request (or direction) from investigators who are soliciting cooperation. Like an effort to preserve officer safety, *see Axsom,* 289 F.3d at 503, however, an effort to preserve opportunities to cooperate should not be understood by a reasonable person as a restriction on movement akin to formal arrest. Assuming a reasonable person in Czichray's position would feel that he was not free to use the telephone during the questioning, he still retained two viable options: conduct an uninterrupted interview with the agents or terminate the interview. *Sutera* and *Helmel* recognize that placing certain ground rules on an interview does not preclude a reasonable person from foregoing the interview altogether.

We also conclude that Czichray's lack of "voluntary

acquiescence" in questioning does not tend to show that he was in custody. The district court thought the mere absence of resistance by Czichray, such as his "ma[king] no attempt to terminate the interview" and allowing the interview "to proceed to its closing," did not "rise to the level of active cooperation" that our court has found to constitute "voluntary acquiescence" as used in the third *Griffin* factor. (Add. at 33-34). Whatever the *Griffin* court meant by "acquiescence," *cf. Webster's Third New International Dictionary* 18 (2002) ("passive assent or submission"); 1 *Shorter Oxford English Dictionary* 20 (5th ed. 2002) ("Silent or passive assent to, or compliance with, measures or proposals"), we conclude that the initiation of questioning by FBI agents in this case is not significant evidence of restraint on Czichray's freedom of movement. Against a backdrop of repeated advice that he was free to terminate the interview, Czichray's decision not to terminate the interview and to allow the interview to proceed to its closing suggests an exercise of free will, rather than restraint to a degree associated with formal arrest. *Cf. Alvarado,* 124 S. Ct. at 2144-46, 2149-50 (where police initiated two-hour interview of suspect in police station, *did not* tell suspect he was free to leave, and engaged in "pretty friendly conversation" during interview, state court was clearly "reasonable" in concluding that suspect was not in custody). This is not a case where a suspect sought to exercise his option of terminating the interview, only to meet resistance from his interrogators.

Czichray argues that "threats" made by the FBI agents should be counted as a factor weighing in favor of custody. We do not believe that informing a suspect that investigation of his alleged fraud will "light up his world" by exposing his activities to his friends, family, and neighbors is a threat that aggravates the existence of custody. *See United States v. Martin,* 369 F.3d 1046, 1052-53, 1057 (8th Cir. 2004). It

is appropriate for an investigator to advise a suspect of the potential course and consequences of a criminal investigation. Suspects frequently confront difficult decisions about whether to defend against potential criminal charges or to pursue resolutions that may ameliorate certain unpleasant consequences. If the suspect's father happens to be a witness with relevant information in such an investigation,[1] then knowledge of potential investigative activities may influence the suspect's decision whether to short-circuit the investigation by cooperating. But the presentation of information that requires such a decision does not tend to restrain a person's freedom of movement such that he should be deemed in custody. As we said in *LeBrun,* "some degree of coercion is part and parcel of the interrogation process and [ ] the coercive aspects of a police interview are largely irrelevant to the custody determination except where a reasonable person would perceive the coercion as restricting his or her freedom to depart." 363 F.3d at 721.

The district court's finding that agents threatened to use the power of the FBI to prevent insurance companies

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[1] Agent Boylan testified as follows at the suppression hearing:

> The only references that were made to [Czichray's] father is he at some point told us later that his father had left -- lent him some money regarding his MRI clinic, and the references were made in the sense of if we believe his father had information that's -- and that's evidence of a crime that's what we'd have to do. We'd have to go talk to that person whether it's his father, a relative, somebody he doesn't know, or whether it's a coemployee.

(Suppr. H'rg Tr., Vol. II at 58, Nov. 26, 2002). Agent Bisswurm testified that Czichray's father was later interviewed, because "[d]uring our interview with Dr. Czichray, he indicated his father loaned him $50,000 for his MRI business, and we went to ask him questions about that loan." (Suppr. H'rg Tr., Vol. III. at 128, Nov. 27, 2002).

from making legitimate payments to Czichray's business is not well explained, because the statements were denied by the agents, and Czichray did not elaborate. Perhaps the point is that agents would notify insurance companies of Czichray's fraudulent practices in the course of their investigation, in which case the insurance companies would cease dealing with Czichray of their own accord. If so, then the "interference" with business would be just another natural consequence of the doctor's fraudulent activities coming to light. If the FBI agents misled Czichray by exaggerating their ability to control the conduct of private insurance companies (or if they really had the power to dictate non-payment of private insurance payments), then their statements might be one of many factors relating to the voluntariness of any admissions, but they would have little or no bearing on whether Czichray's freedom of movement was restrained for purposes of the *Miranda* custody analysis. *Cf. Oregon v. Mathiason,* 429 U.S. 492, 495-96 (1977) ("Whatever relevance [the officer's false statement during questioning] may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule.").

Where a suspect is questioned in the familiar surroundings of his home, and informed several times of his right to terminate the interview at will, we believe that strong evidence of restraint on freedom of movement of the degree associated with a formal arrest is necessary to overcome the natural inference that such questioning is non-custodial. For the foregoing reasons, the totality of the circumstances in this case leads us to conclude that Czichray was not the subject of custodial interrogation, and that the warnings set forth in *Miranda* were not required. We therefore reverse the district court's order granting the motion to suppress Czichray's signed statement.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

I respectfully dissent from the judgment of the court for the reasons that follow.

I.

In granting the motion to suppress, the district court made the following findings of fact, none of which is clearly erroneous. FBI agents, Timothy Bisswurm and Sean Boylan, called Dr. Czichray's home at 4:30 one morning, and when he answered they pretended that they had reached the wrong number. Two hours later, they knocked on his door or rang his doorbell. When Dr. Czichray did not answer, the agents telephoned him and instructed him to open the door. He did so, wearing only a t-shirt and boxer shorts, and the agents informed Dr. Czichray that they wanted to talk to him for "a few minutes." After Dr. Czichray let them come into his home, the agent's "few minutes" turned into nearly seven hours.

During this time, the agents told Dr. Czichray about their investigation into health care fraud and their belief that he was involved. When Dr. Czichray told the agents that he was late for work, they instructed him to call in sick, and when he spoke with his office, the agents further instructed him not to inform his co-workers that the FBI was interviewing him. Dr. Czichray's home and cell phones rang several times during the interview, but the agents admonished him to not answer the calls. When Dr. Czichray wanted to get dressed, Agent Boylan escorted him to the bedroom and did a quick search to ensure that there was no telephone in the room that Dr. Czichray might use to alert others about the FBI's interview. When Dr. Czichray needed to use the bathroom, a similar check was performed.

While the agents informed Dr. Czichray that he was free to end the interview at any time, they also told him that if he did not cooperate they would "light up" his world and tell insurance companies to stop making legitimate payments to his chiropractic practice. After nearly seven hours, one of the agents wrote out a statement outlining what Dr. Czichray had said during the interview, which included an assertion that Dr. Czichray had not been "threatened, coerced, or promised ... anything." Dr. Czichray signed the statement but was never informed of his *Miranda* rights.

II.

Law enforcement officers are bound to give the warnings required by *Miranda v. Arizona,* 384 U.S. 436 (1966), only when a suspect is interrogated in a so-called custodial setting. *See, e.g., Oregon v. Elstad,* 470 U.S. 298, 309 (1985). In *Miranda,* 384 U.S. at 444, the Supreme Court defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Courts do not determine whether a suspect is in custody from the perspective of the interrogator; "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." ***Berkemer*** *v. McCarty,* 468 U.S. 420, 442 (1984). In other words, the question is whether, viewing the totality of the circumstances, a reasonable person would have believed that the police curtailed his or her freedom of movement to a "degree associated with formal arrest." *California v. Beheler,* 463 U.S. 1121, 1125 (1983) (per curiam). Admittedly, "the task of defining 'custody' is a slippery one," *Elstad,* 470 U.S. at 309, that presents mixed questions of fact and law. A court of appeals reviews a district court's custody determination *de novo,* but the underlying factual findings for clear error. *United States v. LeBrun,* 363 F.3d 715, 719 (8th Cir. 2004) (en banc).

In *United States v. Griffin,* 922 F.2d 1343, 1349 (8th Cir. 1990), we identified six considerations which "either mitigate or aggravate an atmosphere of custodial interrogation." These considerations are "whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not under arrest"; "whether the suspect possessed unrestrained freedom of movement" during the interview; "whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions"; "whether strong arm tactics or deceptive stratagems were employed during questioning"; whether the atmosphere of the questioning was dominated by law enforcement officers; and "whether the suspect was placed under arrest at the termination of the questioning." *Id.* No one consideration is dispositive on the question of custody, nor must all of the matters considered weigh in favor of the defendant before a finding that the defendant was in custody is warranted. *Id.* I will address each of these considerations in turn.

With respect to the first consideration, there is no dispute that the agents informed Dr. Czichray several times that he could refuse to speak to them or could ask the agents to leave his home at any time. This weighs against a holding that Dr. Czichray was in custody.

But the restriction on Dr. Czichray's freedom of movement supports the suppression of the statement that he signed. As I have said, when Dr. Czichray announced that he was late for work, the agents, rather than permitting him to leave, directed him to call in sick. And even though he was in his own home and not at a police station, he could not go to his bedroom or bathroom unattended. The district court rejected the government's contention that the agents

escorted Dr. Czichray around his home because they were concerned for their safety. Instead, the district court found that the agents' only reason for escorting Dr. Czichray was "[to] look[] for a telephone to make sure that Czichray did not place any outside calls" to alert others of the investigation.

The government relies heavily on *United States v. Axsom,* 289 F.3d 496 (8th Cir. 2002), to support its contention that requiring that an interviewee be escorted when he or she wants to visit rooms outside the interview area does not restrict the suspect's freedom of movement. In *Axsom,* however, the police escorted the suspect about his house because they had observed numerous weapons when they entered the house to execute a search warrant. In that case we explicitly held that the absence of "unrestrained freedom of movement" was "much less significant" to a determination of whether the suspect was in custody than it otherwise would have been because a reasonable person in the suspect's "shoes should have realized the agents escorted him not to restrict his movement, but to protect themselves and the integrity of the search." *Id.* at 502-03. That was not the case here. There was no evidence to suggest that Dr. Czichray possessed weapons that he might use against himself or the agents, nor was there an ongoing search that needed protection against the destruction of evidence. And the district court found that when Dr. Czichray needed to use the bathroom, the agents asked him whether there was a phone in that room but did not inquire about weapons. The district court had ample reason to believe that the justification of officer safety was a *post hoc* invention, and to find, as it did, that the agents "true concern was preventing Czichray from communicating with anyone else." The agents thus deliberately subjected Dr. Czichray to incommunicado interrogation, a consideration that particularly concerned the *Miranda* court. *See Miranda,*

384 U.S. at 445-46.

The third consideration identified in *Griffin* also supports a finding that Dr. Czichray was in custody: No one disputes that it was the agents who approached the defendant and asked to speak with him. While Dr. Czichray allowed them to enter his home, the district court found that he did not "voluntarily acquiesce[]" to the interview, *see Griffin*, 922 F.2d at 1349. The government argues that *Axsom* precludes this conclusion, but there the defendant (who we said had voluntarily acquiesced) "was extremely friendly and cooperative during the interview" and even telephoned the FBI agents afterward to commend them for their professionalism, *Axsom*, 289 F.3d at 501-02. Here, in contrast, Dr. Czichray did not make any effort to assist in the investigation. While I would not hold that a defendant needs to be enthusiastic about an interview before the balance can tip against a finding that he or she was in custody, I think that the mere absence of resistance is not sufficient to do so.

The magistrate judge who conducted a hearing on the suppression motion made a proposed finding, rejected by the district court, that Dr. Czichray voluntarily acquiesced because he "made no attempt to terminate the interview directly or indirectly" and allowed the interview "to proceed to its closing." *See* 28 U.S.C. § 636(b)(1)(C). There is a difference, however, between allowing an interview to continue and taking affirmative steps to make it go more smoothly. When a defendant can only be said not to be acting in a rude or uncooperative manner, the presumption that an officer-initiated interview lends weight to a finding of custody is not rebutted. I agree with the district court that Dr. Czichray's level of active cooperation was not sufficient to undermine the inferences that are properly drawn from the fact that the agents initiated contact with him. In any event, I believe that in this context the voluntariness of Dr. Czichray's

actions are a matter of fact, and the district court's finding is certainly not clearly erroneous.

I also agree with the district court that it is a "close question" whether the agents used strong-arm tactics or deceptive stratagems in their interview with Dr. Czichray. They did, however, threaten to interfere with Dr. Czichray's legitimate business and to "light up his life," insinuating that they would begin investigating his elderly father unless Dr. Czichray agreed to cooperate. These threats support an inference that Dr. Czichray was in custody.

Whether the police dominated the interview is the fifth consideration under *Griffin.* While we have recognized that "[w]hen a suspect is interrogated in the comfort and familiarity of his home, a court is less likely to find the circumstances custodial," *Axsom,* 89 F.3d at 502, "a suspect's sense of captivity can actually be intensified by the intrusive and intimidating environment created when agents ... take control of a person's private residence," *Griffin,* 922 F.2d at 1355 n.15. The actions of FBI Agents Bisswurm and Boylan, including directing Dr. Czichray not to communicate with others during the interview and not allowing him free, unaccompanied movement about his own home, demonstrate the agents' domination of the interview.

Finally, it is undisputed that the agents did not place Dr. Czichray under arrest at the conclusion of the interview. According to *Griffin,* this fact weighs against a finding that the interview took place in a custodial setting.

III.

To determine whether Dr. Czichray was in custody, we must assess the totality of the circumstances surrounding his statement. It is important to emphasize that the considerations identified in *Griffin* are not by any means

exclusive, and that the answer to the ultimate question depends on a careful evaluation of all the relevant facts. But in this case, I think that our opinion in *Griffin* directs us rather clearly to a conclusion that the district court did not err when it held that Dr. Czichray's situation entitled him to *Miranda* warnings. Only two considerations (whether Dr. Czichray was informed that he was free to end the interview and whether he was arrested at the end of the interview) tend to support a finding that he was not in custody. But actions sometimes speak louder than words. I believe that the agents' restrictions on Dr. Czichray's movements and on his access to his telephones significantly undermined any statements that they made to him about his freedom to ask them to leave or to end the interview. A reasonable person in Dr. Czichray's position would not believe that he was free to end the interview or to ask the agents to leave. Thus only one fact (the absence of an arrest at the interview's conclusion) weighs substantially in favor of the government's position, and in any event as an original proposition it is hard to see why this fact has much if any relevance to the question of whether Dr. Czichray was in custody.

I would therefore hold that Dr. Czichray was in custody when he signed the statement. While the absence of *Miranda* warnings will not require suppression when suspects volunteer inculpatory evidence during a non-custodial interrogation, they must be informed of and voluntarily, intelligently, and knowingly waive their *Miranda* rights when they are in custody, or their statements are inadmissible. *See Miranda,* 384 U.S. at 478-79. Because the written statement in the instant case was made during an "incommunicado interrogation...in a police-dominated atmosphere...without full warnings of constitutional rights," *id.* at 445, I would affirm the district court's order granting the motion to suppress.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3336

United States of America,	*	
	*	
Appellant,	*	Order Denying Petition
	*	for Rehearing and for
v.	*	Rehearing En Banc
	*	
Michael S. Czichray,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Morris S. Arnold, Judge Murphy, Judge Bye, Judge Melloy and Judge Smith would grant the petition for rehearing en banc.

(5128-010199)

October 5, 2004

Order Entered at the direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

(2)

Supreme Court, U.S.
FILED
APR 25 2005
OFFICE OF THE CLERK

No. 04-894

In the Supreme Court of the United States

MICHAEL S. CZICHRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), when he was interviewed in his home and was repeatedly advised, before and during the interview, that his participation in the interview was voluntary.

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No. 04-894

MICHAEL S. CZICHRAY, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A61-A78) is reported at 378 F.3d 822. The district court's memorandum opinion and order granting petitioner's motion to suppress (Pet. App. A12-A60) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 2004. A petition for rehearing was denied on October 5, 2004 (Pet. App. A79). The petition for a writ of certiorari was filed on January 3, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was indicted in the United States District Court for the District of Minnesota on 27 counts of health care fraud, in violation of 18 U.S.C. 1347; false statements relating to health care matters, in violation of 18 U.S.C. 1035; and conspiracy to defraud the United States, in violation of 18 U.S.C. 371. Before trial, petitioner moved to suppress statements he had made during an interview with the Federal Bureau of Investigation (FBI). The district court granted petitioner's motion. Pet. App. A25-A46, A59. The court of appeals reversed. *Id.* at A61-A78.

1. Petitioner, a chiropractor, was a suspect in a long-running FBI investigation of health care fraud in Minnesota. On February 16, 2001, FBI Special Agents Timothy Bisswurm and Sean Boylan interviewed petitioner at his home in Columbia Heights, Minnesota. Around 4:30 a.m. on that date, Agent Bisswurm called petitioner's home to determine whether he was there. When petitioner answered the phone, Agent Bisswurm said that he had the wrong number. Around 6:30 a.m., the FBI agents approached the house and rang the bell or knocked. Petitioner failed to answer the door. When the agents saw through a window that a television and lights were on, they again called the home, and Agent Boylan informed petitioner that he needed to come to the door. Pet. App. A2, A28, A62; C.A. App. 14-15.

When petitioner appeared, clad only in a T-shirt and boxer shorts, Agent Boylan identified himself and Agent Bisswurm as FBI agents and told petitioner that they would like to "take a few minutes of [his] time." The agents specifically advised petitioner that he was free not to talk with them and that, when they were done,

they would "go on [their] way." Petitioner let the agents into the house. Pet. App. A28, A62.

The three men sat down in the living room, and the ensuing interview lasted nearly seven hours. The FBI agents did not administer the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). On several occasions, however, the agents reiterated that petitioner could refuse to speak with them and tell them to leave.[1] At no point did petitioner do so. The agents did not restrain petitioner or threaten to use physical force, nor did they display their weapons or threaten to arrest him. Pet. App. A28, A62-A63; C.A. App. 19, 20.

About an hour into the interview, petitioner asked the agents if he could go to his bedroom to put on some pants. The agents agreed, but Agent Boylan accompanied petitioner to check the room first for a telephone, for the purpose of preventing petitioner from informing others that he was being investigated. Petitioner later asked the agents if he could go to the bathroom; the agents agreed, but Agent Boylan again checked the room first for a telephone.[2] About three hours into the interview, petitioner told the agents that he was late for work. The agents instructed petitioner to call in sick, and directed him not to inform his office about the investigation. Petitioner complied. Although the telephone rang several times during the interview, the agents instructed petitioner not to answer. Petitioner again complied. During the interview, the agents in-

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[1] As the court of appeals noted (Pet. App. A64), the magistrate judge found that the agents advised petitioner "at least eight times" that he could refuse to speak with them and tell them to leave, and noted that "this evidence * * * is not controverted." C.A. App. Add. 113-114.

[2] The magistrate judge found that petitioner also went into the kitchen to get a glass of water and to feed his cat. C.A. App. Add. 74.

formed petitioner that, if he did not cooperate, they would interview his 75-year-old father and others. The agents suggested that they would "light up [his] world" (which petitioner construed to mean that they would "enlighten" his father and others concerning his alleged wrongdoing), and that they could use the power of the FBI to pressure insurance companies to withhold reimbursements from his business. Pet. App. A28-A29, A62; C.A. App. Add. 73-74.

During the course of the interview, petitioner made various incriminating oral statements. At the end of the interview, petitioner also signed a written statement prepared by the FBI agents (after making one correction). In that written statement, petitioner made further admissions and acknowledged that "no one ha[d] threatened, coerced, or promised [him] anything." Petitioner initialed and dated each page and then signed the statement. Petitioner was not arrested at the end of the interview. Pet. App. A30, A63; C.A. App. Add. 75.

2. In the course of its health care fraud investigation, the FBI determined that petitioner had presented false documents and statements to local banks when applying for a federally guaranteed loan. That discovery resulted in petitioner being indicted in the United States District Court for the District of Minnesota on six counts of bank fraud and related offenses. C.A. App. 13; Gov't C.A. Br. 1.

Before trial on the bank fraud charges, petitioner moved to suppress the oral statements he had made during the FBI interview,[3] on the grounds (1) that he had been subjected to custodial interrogation without

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[3] The government decided to offer only petitioner's oral statements, and not his written statement, into evidence. Pet. App. A5 n.1.

receiving *Miranda* warnings and (2) that his statements were involuntary under the Due Process Clause. After conducting an evidentiary hearing at which petitioner and the FBI agents testified, a magistrate judge recommended that petitioner's motion be denied. C.A. App. 13-23. Without conducting an evidentiary hearing of its own, the district court rejected the magistrate judge's report and recommendation and granted petitioner's suppression motion, on the ground that petitioner was "in custody" under *Miranda* during the interview. Pet. App. A1-A11. Because the district court did not announce its decision until immediately after the jury was empaneled, the government was unable to appeal. See 18 U.S.C. 3731. Petitioner was subsequently convicted on three of the six counts, but has yet to be sentenced. See Gov't C.A. Br. 3.

3. On November 19, 2002, a federal grand jury in the District of Minnesota returned a superseding indictment charging petitioner and three others on 27 counts of health care fraud and related offenses. Before trial, petitioner moved to suppress the oral and written statements that he had made during the FBI interview,[4] again on the grounds that he had been subjected to custodial interrogation without *Miranda* warnings and that his statements were involuntary. After a five-day evi-

[4] In their respective opinions, the district court and the court of appeals seemingly operated on the assumption that petitioner was seeking to suppress only his *written* statement. See, *e.g.*, Pet. App. A25-A26, A61. The magistrate judge, however, stated that petitioner was seeking to suppress the "statements" he made to the FBI agents, without drawing any distinction between the oral and written statements. See, *e.g.*, C.A. App. Add. 106. In any event, the *Miranda* inquiry as to petitioner's oral and written statements is identical, because all of those statements were made in the course of the same interview.

dentiary hearing on that motion and others (in which the agents, but not petitioner, testified), a different magistrate judge recommended that the motion be denied. C.A. App. Add. 72-75, 106-128, 153. After reviewing the evidence from the hearing and from the suppression hearing in the bank fraud case, the magistrate judge concluded that the suppression issue was "not a close one." *Id.* at 112 n.33. The magistrate judge also noted that he had "strong misgivings as to [petitioner's] credibility" in his earlier testimony, and that the testimony of Agents Bisswurm and Boylan, by contrast, was credible. *Id.* at 127 n.39.

4. Again without conducting a separate evidentiary hearing, the district court rejected the magistrate judge's report and recommendation in relevant part and granted petitioner's suppression motion, on the ground that petitioner was "in custody" under *Miranda* during the interview. Pet. App. A25-A46, A59. As a preliminary matter, the court rejected petitioner's contention that the disposition of his motion was controlled by the doctrines of law of the case and issue preclusion. *Id.* at A30-A32. On the merits, the court, applying the six-factor test for "in custody" determinations articulated in *United States* v. *Griffin*, 922 F.2d 1343 (8th Cir. 1990), concluded that petitioner was in custody notwithstanding the fact that the FBI agents had repeatedly informed petitioner that he could refuse to speak with them and tell them to leave. Pet. App. A32-A46.

5. The court of appeals reversed. Pet. App. A61-A78.

a. At the outset, the court of appeals noted that "the ultimate question in determining whether a person is in 'custody' for purposes of *Miranda* is 'whether there is a formal arrest or restraint on freedom of movement of

the degree associated with a formal arrest.'" Pet. App. A63 (quoting *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)). The court reasoned that "[t]he most obvious and effective means of demonstrating that a suspect has not been taken into custody" is to inform the suspect that he may terminate the interview at will, *id.* at A64 (quoting *Griffin*, 922 F.2d at 1349), and added that the FBI agents in this case "exercised this 'obvious and effective' means of demonstration in spades," *ibid.* The court observed that the agents' repeated assurances that petitioner could terminate the interview constituted "powerful evidence" that a reasonable person would have understood that he was free to terminate the interview, *ibid.*, and noted that it could not identify a single case from this Court or from any court of appeals (except for one Ninth Circuit case "decided under an outmoded standard of review") holding that an individual was in custody despite such assurances, *id.* at A64-A65.

The court of appeals then reasoned that the "weighty inference" that petitioner was not in custody after receiving the FBI agents' assurances was "strengthened further by the context in which the interview occurred—the living room of [petitioner's] home." Pet. App. A65. The court noted that it had repeatedly held that, when an individual was questioned in his own home, such surroundings were "not indicative of the type of inherently coercive setting that normally accompanies a custodial interrogation." *Ibid.* (quoting *United States* v. *Helmel*, 769 F.2d 1306, 1320 (8th Cir. 1985)). The court added that, in the only case in which this Court had considered whether an individual was in custody during questioning in a private home absent formal arrest, the Court had held that *Miranda* warnings were

not required. *Id.* at A65-A66 (citing *Beckwith* v. *United States*, 425 U.S. 341 (1976)).

Finally, the court of appeals rejected the various factors on which the district court had relied in concluding that petitioner was in custody. Pet. App. A66-A71. The court noted that the factors identified in its earlier decision in *Griffin*, *supra*, were "not by any means exclusive," and that the *en banc* Eighth Circuit had recently reviewed a custodial determination without so much as citing *Griffin*. *Id.* at A67 (citing *United States* v. *LeBrun*, 363 F.3d 715 (2004), cert. denied, 125 S. Ct. 1292 (2005)). According to the court of appeals, a reviewing court "must consider whether the *historical facts*, as opposed to the one-step-removed *Griffin* factors[,] establish custody." *Ibid.* As to those facts, the court of appeals reasoned that it was not significant that the FBI agents had instructed petitioner not to use the telephone, on the ground that "an effort to preserve opportunities to cooperate should not be understood by a reasonable person as a restriction on movement akin to formal arrest." *Id.* at A68. "[P]lacing certain ground rules on an interview," the court continued, "does not preclude a reasonable person from foregoing the interview altogether." *Ibid.* With regard to the fact that the agents, and not petitioner, had initiated the interview, the court concluded that that fact was "not significant evidence of restraint on [petitioner's] freedom of movement": to the contrary, petitioner's decision not to *terminate* the interview, when measured against the agents' repeated assurances that he was free to do so, suggested "an exercise of free will, rather than restraint to a degree associated with formal arrest." *Id.* at A69. And as to the agents' alleged threats to "light up [petitioner's] world" and to inform insurance companies of

petitioner's alleged wrongdoing, the court of appeals reasoned that "[i]t is appropriate for an investigator to advise a suspect of the potential course and consequences of a criminal investigation," and that "the presentation of [such] information * * * does not tend to restrain a person's freedom of movement such that he should be deemed in custody." *Id.* at A69-A70. Under the totality of the circumstances, the court concluded, petitioner was not in custody. *Id.* at A71.

b. Judge Morris Sheppard Arnold dissented. Pet. App. A72-A78. Although Judge Arnold recognized that the FBI agents had repeatedly informed petitioner that he could refuse to speak with them and tell them to leave, *id.* at A74, he reasoned that the agents' "restrictions" on petitioner's movements and access to telephones "significantly undermined" the effect of the agents' assurances, *id.* at A78. Applying the multifactor test from *Griffin*, *supra*, Judge Arnold concluded that "[a] reasonable person in [petitioner's] position would not believe that he was free to end the interview or to ask the agents to leave." *Ibid.*

c. The court of appeals denied petitioner's petition for rehearing en banc, with five judges voting to grant the petition. Pet. App. A79.

ARGUMENT

Petitioner renews his claim (Pet. 8-16) that he was "in custody," and therefore entitled to receive the warnings specified by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), at the time of his statements to the FBI agents. Further review of that fact-bound claim is unwarranted. The court of appeals' decision is correct and consistent with this Court's decisions, and petitioner does not contend that it conflicts with any decision of another court

of appeals. Accordingly, the petition for a writ of certiorari should be denied.

1. Under *Miranda*, statements taken in custodial interrogation must generally be preceded by specified warnings in order to be admissible in the government's case-in-chief. *Miranda* warnings, however, are not required in every instance of official questioning; instead, they are necessary "only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Oregon* v. *Mathiason*, 429 U.S. 492, 495 (1977) (per curiam). In a series of post-*Miranda* decisions, this Court has made clear that, in order to determine whether an individual was in custody, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California* v. *Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (quoting *Mathiason*, 429 U.S. at 495); accord *Thompson* v. *Keohane*, 516 U.S. 99, 112 (1995); *Stansbury* v. *California*, 511 U.S. 318, 322 (1994) (per curiam); *Berkemer* v. *McCarty*, 468 U.S. 420, 440 (1984). This Court has emphasized that, in making that determination, a reviewing court must examine the totality of the circumstances in order to determine "how a reasonable person in [the individual's] position would perceive his or her freedom to leave." *Stansbury*, 511 U.S. at 325.

The court of appeals correctly applied those principles in holding that, under the totality of the circumstances, petitioner was not in custody during the interview with the FBI agents. Notably, the agents informed petitioner, both at the outset of the interview and repeatedly thereafter, that he could refuse to speak with them and tell them to leave; at no point did petitioner seek to exercise that right. In cases in which the

individual being questioned is informed that he is free to terminate the interview, lower courts have consistently concluded that the individual is not in custody for *Miranda* purposes. See, *e.g.*, *United States* v. *Wolk*, 337 F.3d 997, 1006 (8th Cir. 2003); *United States* v. *Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001), cert. denied, 534 U.S. 1151 (2002); *United States* v. *Menzer*, 29 F.3d 1223, 1232-1233 (7th Cir.), cert. denied, 513 U.S. 1002 (1994); cf. *Mathiason*, 429 U.S. at 493 (holding that individual was not in custody when he was told at outset of interview that he was not under arrest). Moreover, the agents interviewed petitioner in the comfort of his own home, rather than in the "police-dominated atmosphere" of a station house. *Miranda*, 384 U.S. at 445. In cases in which an individual is questioned in his own home (or in other familiar surroundings), lower courts have again routinely held that the individual is not in custody. See, *e.g.*, *United States* v. *Nishnianidze*, 342 F.3d 6, 14 (1st Cir. 2003); *United States* v. *Parker*, 262 F.3d 415, 419 (4th Cir. 2001); *United States* v. *James*, 113 F.3d 721, 727 (7th Cir. 1997). When taken together, therefore, the fact that petitioner was repeatedly told that he was free to terminate the interview and the fact that petitioner was interviewed in his own home justify a "natural inference" that petitioner was not in custody for *Miranda* purposes. Pet. App. A71.

Other circumstances supported the court of appeals' holding that petitioner was not in custody. The FBI agents did not restrain petitioner during the interview or threaten to use physical force, nor did they display their weapons or threaten to arrest him. Petitioner was free to move about the house, and, while he was accompanied to his bedroom and to the bathroom, he was then left unsupervised. Petitioner was allowed to get

dressed, use the bathroom, and (according to the magistrate judge) get a drink and feed his cat. And petitioner was allowed to call his office, though he was told not to inform it of the investigation. All of those circumstances confirm that a reasonable person in petitioner's position would have felt free to terminate the interview, and thus that petitioner was not in custody.

Neither the fact that the FBI agents instructed petitioner not to answer the telephone (and accompanied him around the house), nor the fact that the agents told petitioner that they would "light up [his] world" (and put pressure on insurance companies) if he refused to cooperate, rendered him in custody. The agents told petitioner not to answer the telephone (and accompanied him around the house), for the purpose of preventing petitioner from informing others that he was being investigated.[5] In conducting an interview, officers are entitled to take reasonable steps to prevent the interviewee from compromising the integrity of the overall investigation. See, *e.g.*, *United States* v. *Sutera*, 933 F.2d 641, 647-648 (8th Cir. 1991) (upholding prohibition on using telephone). A reasonable person in petitioner's position would not have construed the agents' actions as imposing "restraint on freedom of movement of the degree associated with a formal arrest," *Beheler*, 463 U.S. at 1125; instead, given the agents' repeated assurances that the interview was voluntary, a reasonable person in petitioner's position would have concluded that he retained the option either to submit to the interview un-

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[5] The agents also testified that they accompanied petitioner around the house in order to ensure their own safety. Pet. App. A34. The district court noted, however, that the agents did not communicate this justification to petitioner. *Ibid.*

der the modest conditions imposed by the agents, or to terminate the interview altogether.

The FBI agents' statements that they would inform others about petitioner's alleged wrongdoing if he did not cooperate did not create or contribute to custodial conditions. Although the agents' statements may have affected petitioner's calculus in deciding *whether* to terminate the interview, they did not suggest that petitioner was not free to terminate the interview at all. As this Court has noted, "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it"; indeed, even *false* statements by an officer designed to induce a confession are irrelevant to the custody inquiry. *Mathiason*, 429 U.S. at 495-496. Because the agents' statements, and their conduct during the interview, would not have suggested to a reasonable person that he was not free to terminate the interview, the court of appeals' holding that petitioner was not in custody was correct and does not merit further review.

2. Petitioner does not contend that the court of appeals' decision conflicts with any decision of another court of appeals, but instead contends only that it conflicts with this Court's decisions in *Beckwith* v. *United States*, 425 U.S. 341 (1976), and *Orozco* v. *Texas*, 394 U.S. 324 (1969), involving custodial determinations for individuals being questioned at home, and with this Court's decision in *Thompson* v. *Keohane*, 516 U.S. 99 (1995), concerning the standard of review for custodial determinations. Those contentions lack merit.

a. In *Beckwith*, as in this case, two law-enforcement officers interviewed an individual in his home. 425 U.S. at 342. The officers did not inform the individual that he was free to terminate the interview, though they did inform him that they could not compel him to answer

their questions and that he could seek the assistance of an attorney. *Id.* at 343. The officers proceeded to interview the individual for approximately three hours. *Id.* at 342-343. The Court held that the individual was not in custody under *Miranda*, notwithstanding the fact that he was the "focus" of the officers' investigation. *Id.* at 347. Contrary to petitioner's contention (Pet. 13), the Court did not affirmatively "open[] a door to future claims like [petitioner's]"; instead, the Court stated only that "noncustodial interrogation might possibly in some situations, by virtue of some special circumstances," give rise to statements that were *involuntary* for purposes of the Due Process Clause. 425 U.S. at 347-348. In any event, the court of appeals in this case did not hold that an individual being questioned at home could *never* be in custody for *Miranda* purposes; instead, it held only that, under the totality of circumstances, *petitioner* was not in custody. See, *e.g.*, Pet. App. A71. Nothing in the court of appeals' decision thus conflicts with *Beckwith*.

In *Orozco*, four police officers investigating a murder arrived at a boardinghouse around 4 a.m., entered an individual's bedroom, and began to question him. 394 U.S. at 325. One of the officers conceded that the individual was not free to leave during the questioning, but was already under arrest. *Ibid.* The Court, after rejecting a bright-line rule that an individual being questioned at home could never be in custody for *Miranda* purposes, held that the individual was in custody. *Id.* at 326-327. This case critically differs from *Orozco* because petitioner was affirmatively, and repeatedly, told that he could refuse to speak with the agents and tell them to leave; for that reason, a reasonable person in petitioner's position would have felt free to terminate

the interview. Since the court of appeals' decision did not *foreclose* the possibility that an individual being questioned at home may nevertheless be in custody, it is does not conflict with *Orozco*.

b. Petitioner's reliance on *Thompson* is likewise misplaced. In *Thompson*, the Court held that a state court's custodial determination was subject to independent review by a federal habeas court. 516 U.S. at 116. Consistent with *Thompson*, the court of appeals in this case (following Eighth Circuit precedent) noted that a federal district court's ultimate custodial determination was reviewed *de novo* on direct review, but that its underlying factual findings were reviewed only for clear error. Pet. App. A63. Petitioner does not directly challenge this standard, but instead seemingly contends only that the court of appeals ("[c]ontrary to *Thompson*," Pet. 9) failed to *adhere* to this standard by substituting its own findings for those of the district court. The court of appeals, however, expressly noted that "[t]he district court * * * [had] made extensive findings of fact" and that "the government does not assert on appeal that any of these findings were clearly erroneous." Pet. App. A61-A62. Petitioner does not identify a single inconsistency between the facts as found by the district court and as recited by the court of appeals; instead, petitioner challenges only the court of appeals' concededly differing assessment of the legal *significance* of the facts. See Pet. 8-11. Because the court of appeals was required to defer to the district court only with respect to its underlying findings, any asserted conflict with *Thompson* is illusory.[6]

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[6] Petitioner also suggests (Pet. 14-15) that the court of appeals' decision conflicts with its earlier decisions in *United States* v. *Griffin*,

3. Finally, any review of the court of appeals' decision would be premature because that decision is interlocutory. Petitioner has not yet been tried on the underlying criminal charges in this case. In addition, because the district court held that petitioner's statements should be suppressed because he was in custody for *Miranda* purposes, it did not reach petitioner's alternative claim that his statements were involuntary under the Due Process Clause. If the statements are suppressed on that basis, or if petitioner is ultimately acquitted following a trial on the merits, the claims that he raises in his petition will be moot. On the other hand, if petitioner is convicted, he will be able to raise the instant claims—together with any other claims he might have—in a petition for writ of certiorari seeking review of the final judgment against him. Accordingly, the case is not ripe for review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2005

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922 F.2d 1343 (8th Cir. 1990), and *United States* v. *Longbehn*, 850 F.2d 450 (8th Cir. 1988). This Court, however, does not sit to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

(3)

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No. 04-894

In the Supreme Court of the United States

MICHAEL CZICHRAY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MR. CZICHRAY'S REPLY TO THE GOVERNMENT'S BRIEF IN OPPOSITION TO HIS PETITION FOR CERTIORARI

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The criminal law has always been about disputes of fact and how to resolve them. The defendant's version is for the trier to accept or reject. Police testimony in conflict with the defendant's is not sacrosanct. The fact finder here, an experienced District Court Judge, was in the best position to believe one witness over another, and to weigh the inferences that flow from what is said by each side.

The Solicitor acknowledges Czichray's claim "is fact bound," Brief at p. 9, yet does not recognize what the facts were found to be. The District Court, weighing the "credibility of their narrators," Thompson v. Keohane, 516 U.S. 99, 110 (1995), ruled the patina of Mr. Czichray's testimony shined, while the F.B.I. rendition was dim at best. The agents lied when initially contacting Czichray at 4:30 a.m., lied at 6:00 a.m. as to how long they planned to stay at his home, and then made Czichray himself lie when calling his business to say he would be out for the day. Thus it was a small step for the District Court to find that having lied about the little things, the Agents were not candid as to the big question.

Which was whether Czichray's belief that he was in custody was reasonable. Stansbury v. California, 511 U.S. 318, 325 (1994). It was the kind of decision the law requires a Judge to make day in and day out.

Who was telling the truth? Somehow, someway, someone has to decide. Judge Tunheim accepted his duty, and rejected the F.B.I.'s testimony. He could do it, and he did it.

The Solicitor's elegant brief does not come to terms with the District Court's finding that the Agents' assurances the interview was non-custodial, while perhaps said, were lacking in sincerity. (JRT Order I at p. 7). A constellation of factors – their control of his home, the phone line, access to bathroom, and their willingness to threaten the viability of his

business – undercut the Agents' platitudes their interview was without restriction, hence non-custodial.

The Solicitor surprisingly claims that there is not "a single inconsistency between the facts as found by the District Court and as recited by the Court of Appeals," and that the dispute concerns only the legal "significance" thereof. Brief at p. 15. Yet the key fact was hotly disputed: whether Czichray reasonably believed he was in custody. A-10. That finding had to be made and was. "The Court concludes that under the totality of the circumstances, a reasonable person in Czichray's position would not have believed that he was free to terminate the interview and ask the Agents to leave." A-45. And to make that finding, Judge Tunheim had to situate himself in Mr. Czichray's "shoes." Thompson, 516 U.S. at 119 (J. Thomas, joined by C.J. Rehnquist, dissenting).

It's a finding, too, not easily disturbed on an appeal. This Court should be careful with the Solicitor's claim that "any asserted conflict with Thompson is illusory." Brief at p. 15. If the Thompson standard of review is to be applied to direct appeals, as the Eighth Circuit has here and in other cases, e. g. United States v. Axsom, 289 F.3d 496, 500 (8th Cir. 2002), then Judge Tunheim's finding that Mr. Czichray was reasonable in his thought process is presumed correct, consistent with the habeas case law. Yarborough v. Alvarado, 124 S.Ct. 2140, 2150 (2004). In the alternative, his finding is entitled to complete deference because, as an historical fact, it is founded upon a credibility determination, an exercise in which appellate courts do not engage. Thompson, 516 U.S. at 110. Either way, the standard of review could not be ignored by the Eighth Circuit, which found Czichray's belief was unreasonable based upon the assurances of F.B.I. agents whose credibility was found lacking.

On the merits, Beckwith v. United States, 425 U.S. 341 (1976) left open the question presented here, whether, in a defendant's abode, government agents may talk and behave in such a way to "bring about confessions not freely self-determined." Id. at 347-348. Since Beckwith, this Court has consistently held a home is a special place with heightened protections against government intrusion. E. g. Kirk v. Louisiana, 536 U.S. 635, 638 (2002). It's anomalous that federal agents are prohibited from seizing a home without a warrant, Payton v. New York, 445 U.S. 573, 576, 590 (1980), but are permitted, by the Eighth Circuit's opinion, to occupy Mr. Czichray's house for hour after hour, sweeping about for their security, rendering Mr. Czichray isolated and powerless inside the place he is supposed to own. The moment the Agents walked through the door at 6:00 a.m. to begin their camp out, Mr. Czichray was unfree.

The Solicitor claims other Circuits have "routinely held that the individual is not in custody" during an in-home interrogation, Brief at p. 11 (citing United States v. Nichnianidze, 342 F.3d 6, 14 (1st Cir. 2003) (forty-five minute interview); United States v. Parker, 262 F.3d 415, 419 (4th Cir. 2001) (thirty minute interview); United States v. James, 113 F.3d 721, 727 (7th Cir. 1997) (place of business interview; short duration). Likewise, the Solicitor argues that since Mr. Czichray was informed he could leave, the cases have said he was not in custody. Brief at p. 11 (citing United States v. Wolk, 337 F.3d 997, 1006 (8th Cir. 2003) (statement obtained during a thirty minute search); United States v. Hayden, 260 F.3d 1062, 1066 (9th Cir. 2001) (two interviews the first twenty minutes long, the District Court finding defendant's version of facts did not "ring true"), cert. denied, 534 U.S. 1151 (2002), and United States v. Menzer, 29 F.3d 1223, 1232-1233 (7th Cir.) (prison interview where defendant obviously could not leave), cert. denied, 513 U.S. 1001

(1994). But none of these decisions come close to seven hours. None began with deceit. And none featured a factual finding that the defendant was truthful in his perception, and it was reasonable for him to think the way he did.

The case is ripe for review. E. g. United States v. Sabri, 541 U.S. 600 (2004) (decision on the government's pretrial appeal).

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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Dated: May 3, 2005